TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [illegible]

No. [illegible] 17

MARCELINA TORRES ZAYAS, APPELLANT AND PLAINTIFF IN ERROR,

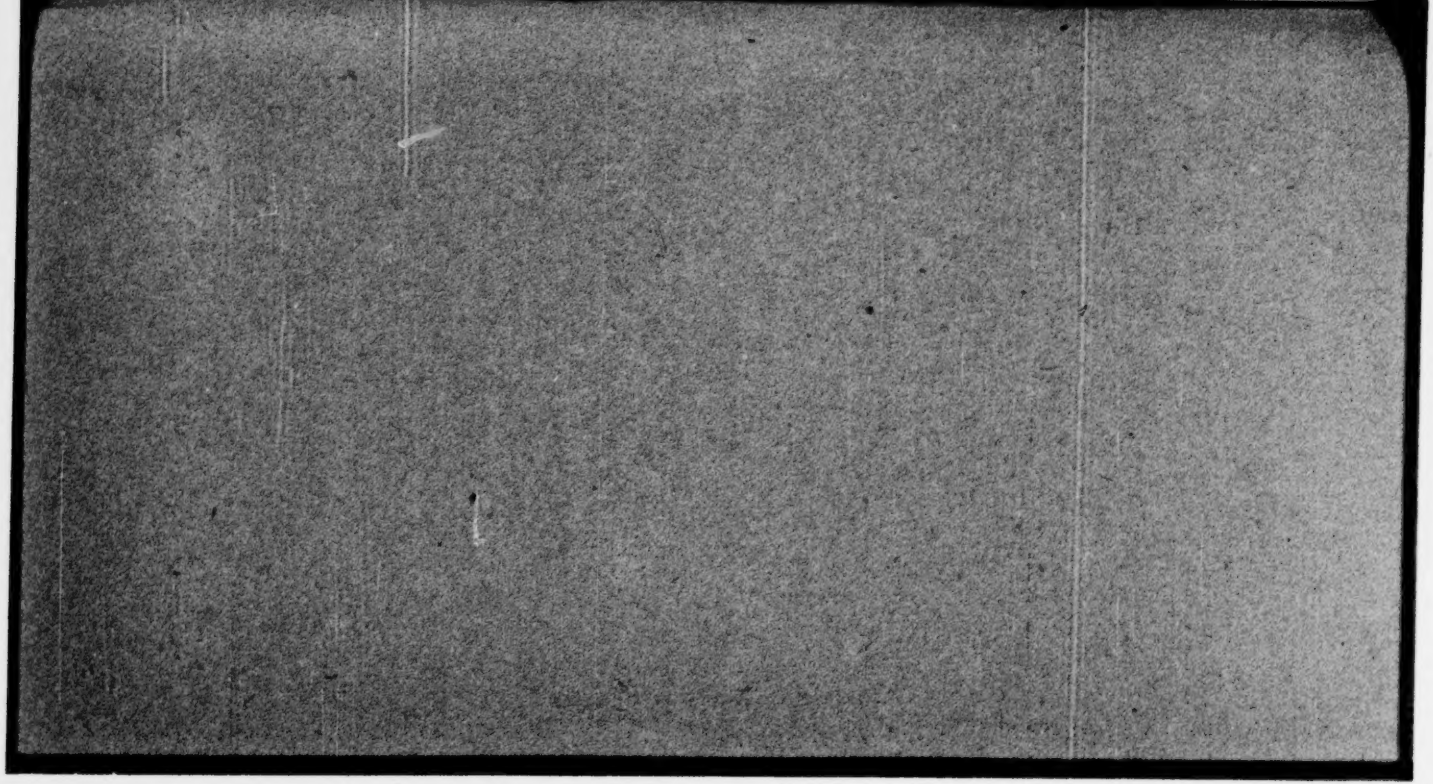
vs.

LOTHROP, LUCE & COMPANY, PEDRO JUAN ROSALY Y CAPO, AND ALICE LOTHROP.

APPEAL FROM AND IN ERROR TO THE SUPREME COURT OF PORTO RICO.

FILED NOVEMBER 16, 1916.

(22,404)



(22,404)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911.

No. 435.

MARCELINA TORRES ZAYAS, APPELLANT AND PLAINTIFF IN ERROR,

vs.

LOTHROP, LUCE & COMPANY, PEDRO JUAN ROSALY Y CAPO, AND ALICE LOTHROP.

APPEAL FROM AND IN ERROR TO THE SUPREME COURT OF PORTO RICO.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 2, 1912.

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1 In the Supreme Court of Porto Rico.

No. 337.

MARCELINO TORRES ZAYAS
vs.
LOTHROP, LUCE & CO., PEDRO JUAN ROSALY Y CAPÓ, and ALICE LOTHROP.

Appeal from the District Court for the Judicial District of Ponce, P. R.

Transcript of Record on Appeal to the Supreme Court of the United States.

Record of the proceedings of the Supreme Court of Porto Rico in the above entitled cause, which is an action involving: 1st. The nullity of a foreclosure proceeding and judicial sale, as well as that of a mortgage and of certain registrations made in the Registry of Properties; 2nd. Claim of certain rents and proceeds of fruits; and 3rd. Damages, the same having been disposed of at the third regular term of said Court in the year 1910, the following papers having been filed, and the following proceedings having been had therein, to wit:—

2 In the Supreme Court of Porto Rico.

No. —.

MARCELINO TORRES ZAYAS
vs.
LOTHROP, LUCE & CO., PEDRO JUAN ROSALY CAPÓ & ALICE LOTHROP.

Action involving: 1st. The nullity of a foreclosure proceeding and judicial sale, as well as that of a mortgage and of certain registrations made in the registry of property; 2nd. Claim of certain rents and proceeds of fruits; and 3rd. damages.

Transcript of Record.

Amended Complaint.

Before the Honorable the Judge of the Court:

Now comes the plaintiff Don Marcelino Torres Zayas, by the undersigned attorneys, his counsel, and files this suit involving: 1st. the nullity of a foreclosure proceeding and judicial sale of the mortgaged property, as well as that of the mortgage constituted by the

purchaser thereof, and of certain registrations made in the Register of Property; 2nd. claim of the proceeds of fruits and rents received therefrom; and 3rd. damages, the said suit being brought against the partnership Lothrop Luce and Co., Don Pedro Juan Rosaly y Capó, and Doña Alice Lothrop.

And as first cause of action, he alleges:

1st. That on the 26th of February, 1901, the plaintiff, Don Marcelino Torres Zayas, who was then married to Doña Mercedes Laborde Perez, entered into a mortgage contract with Mr. William Sturgis Hooper Lothrop, by a public deed executed on
3 the aforesaid date, before Don Rosendo Matienzo Cintrón, a Notary Public; a literal copy of which deed is herein filed, marked as exhibit A, and made an essential part of these allegations.

The said deed was recorded in the Registry of Property of Ponce, in so far as the mortgage constituted by Mr. Torres in favor of Mr. Lothrop was concerned, at folio 245 of Book 30 of Juana Diaz, property No. 1538, registration No. 8.

2nd. That by virtue of the said mortgage contract executed in the aforesaid deed, a literal copy of which is herein filed as exhibit A, as above stated, the debtor Don Marcelino Torres paid to his creditor William Sturgis Hooper Lothrop, during the ensuing years and as interest thereon, the following amounts: Four thousand six hundred dollars as interest due on the 26th of February, 1902; another four thousand six hundred dollars as interest due on the 26th of February, 1903; and another four thousand six hundred dollars as interest due on the 26th of February, 1904. That on the 3rd. of May, 1904, the debtor Torres Zayas did not owe any amount whatsoever, as interest due on said mortgage, to the creditor Mr. Lothrop. The payment was made in the manner stated in the following allegation.

3rd. That in the 9th clause of the mortgage deed filed herewith, "the contracting parties, Torres and Lothrop, agreed that all the produce of the mortgaged properties should be delivered to Mr. De Ford and Co., of Ponce, to be sold by them, so that the latter should deduct from the value of said produce the amount of the interest which should be paid annually to the creditor Mr. Lothrop, and the balance should be delivered to the debtor Mr. Torres, to cover
the regular expenses of the properties, and the latter should
4 apply to the extinction of the debt such sums as might be in excess of such expenditures.

And in furtherance of the aforesaid 9th clause, Mr. Torres delivered to De Ford & Co., who, for this purpose, were appointed agents of William Sturgis Lothrop in the mortgage deed, all the produce of the mortgaged property, that is of the property named "Semil," from the date on which the mortgage was constituted up to the 3rd of May, 1904; that the produce delivered by Mr. Torres to De Ford & Co. during the year from the 26th of February, 1903, to the 26th of February, 1904, were sold by them and the money so obtained from the sale, which greatly exceeded the amount of the interest due during that year and payable on February 1904, was delivered to them, as agents appointed for this purpose by William

Sturgis Lothrop, the object of the delivery of said money being to pay, in the first place, said interest in accordance with the aforesaid clause, and in this manner the interest due on the 26th day of February, 1904, was paid off.

4th. That when the said mortgage was constituted, the debtor Torres Zayas delivered to the attorney-in-fact of his creditor Mr. Lothrop, eight notes for the amount of five thousand seven hundred and fifty dollars each, it being stated on every note that the same bore interest at the rate of ten per cent. per annum, the said notes, and the interest thereon, being payable on the 26th of February, 1905.

That the creditor Mr. Lothrop ceded the said notes to third persons, before the 26th of February, 1904, and the said notes were also in the hands of third persons, on the 3rd of May, 1904, and long time thereafter. And the amount of said notes covered the interest of the debt as well as the principal.

5 5th. That notwithstanding the facts stated in the foregoing allegations, Mr. William Sturgis Hooper Lothrop filed a complaint on the 3rd of May, 1904, in the District Court of Ponce, against Don Marcelino Torres Zayas, to recover the sum of four thousand six hundred dollars due on the 26th of February, 1904, on the mortgage above referred to, which amount had already been paid, as stated above, and in said complaint Mr. Lothrop instituted the special proceeding authorized by the Mortgage Law for the foreclosure of mortgages. The aforesaid mortgage deed and the registration made in the Registry of Properties of Ponce showed that Don Marcelino Torres Zayas was married when he acquired the mortgaged properties and that, as a consequence thereof, said properties belonged in equal parts to him and his wife Da. Mercedes Laborde. And nevertheless, the aforesaid suit was brought by Mr. Lothrop against Don Marcelino Torres only.

A copy of said complaint follows as an essential part of these allegations; it reads as follows:

"Ponce, April 25, 1904. Hon. Court of this Judicial District.—Now comes R. Ulpiano Colóm, attorney-at-law before the Hon. District Court, on behalf of Mr. William Sturgis Hooper Lothrop, a merchant having his domicile in Boston (State of Massachusetts), and respectfully states: That Don Marcelino Torres y Zayas, a farmer, and a resident of Juana Díaz, is owing to my client the sum of four thousand six hundred dollars as an instalment due on, and secured by a mortgage hereinafter mentioned, and all privaate efforts which have been made for the collection of said sum having failed, the special proceeding authorized by the Mortgage Legislation in force is hereby instituted for such purpose, the com-

6 plaint being based on the following facts and juridical reasons:

Facts.—First. In the public deed executed in this city, on the 26th of February, 1901, before Don Rosendo Matienzo Cintrón, a Notary Public, Don Marcelino Torres y Zayas, a farmer, of age, and a resident of Juana Díaz, declared to be owing to Mr. William Sturgis Hooper Lothrop, married, a merchant, and a resident of the

city of Boston (State of Massachusetts U. S. A.) the sum of forty six thousand dollars ($46,000.00), which he bound himself to pay in this city, on the twenty first day of February, nineteen hundred and five (February 21st, 1905), without any other excuse than that which might be based on the existence of a cyclone or any other unforeseen event.—Second. It was agreed in the same document that the capital stated above should bear interest from the said date, the 26th of February, 1901, up to the final and total payment thereof, at the rate of 10% per annum, payable by the debtor Mr. Torres Zayas to the creditor Mr. Lothrop or to his legal representative in this city, in annual instalments after they had become due, on the 26th day of February, of each of the ensuing years, without excuse or pretext whatsoever. Third. In order to secure the payment of said principal and interest, the debtor Mr. Torres y Zayas, and Mrs. Collazo, Perez Guerra and Co., the latter appearing as contracting parties in the following deed, constituted a voluntary mortgage upon several properties, among others, one belonging to the former, the description of which, is as follows: A coffee plantation, named "El Semil" situated in the ward of Villalba-arriba, in the
Municipal jurisdiction of Juana Díaz, covering an area, of
7 five hundred and thirty five cuerdas and sixteen hundredths,
equivalent to two hundred and ten hectares fifty three ares and ninety-two centiares, with the following establishments: A wooden dwelling house, covered with zinc; another house of the same construction for a store; a wooden ware-house, covered with zinc for the storage of fruits with special arrangements for the drying thereof, on the ground floor; a hulling-machine for coffee; a shed for laborers and twelve small wooden houses covered with zinc, as a dwelling for the laborers' families. The said property is bounded on the North by a public road and by lands belonging to Juan Felix Baez, Socorro García, and to the Succession of Don Severo Segarra; on the East, by lands belonging to Don Domingo Olivieri, to the Succession of Catalina Mato, to Lucas Negrón, Julián Negrón, to the said Don Domingo Olivieri, to the Succession of Juan Angel Rosario, to Tomás Negrón and to José Torres; on the South, by lands belonging to Don Genaro Rivera, Don José del Carmen, Doña Dominga Negrón, Don Marcial Serrallés, Don Eduvigis Rodriguez, Don Ramón Sanchez, Don Pedro Morales, and Don Antonio Santí; and on the West, by a public road and lands belonging to Don Juan Zaragoza, Don José del Carmen Negrón, and to the Succession of Don Severo Segarra. Fourth. It was expressly stipulated, and it was so specified when the liability of each of the mortgaged property was determined, that the property just described, and which was marked as property No. 1, in the first fact of the aforesaid deed, was liable for the amount of thirty seven thousand dollars of capital, for the interest accruing from this capital, secured by law in prejudice of third parties, and for two thousand dollars for costs. Fifth.
For the purpose of all the acts and proceedings which might
8 arise by virtue of this contract, the parties expressly submitted themselves to the judges of this city, expressly waiving also any other domicile. It so appears more specifically stated in the

aforesaid deed of the 26th of February, 1901, an authentic copy of which is filed herewith under the letter A, recorded in the Registry of Properties, in so far as the property described in the third fact of this complaint is concerned, on folio 245, of Book 30 of Juana Díaz, property No. 1538, 8th registration thereof. Sixth. Don Marcelino Torres Zayas has not paid the four thousand six hundred dollars ($4,600.00) of the instalments of interest due on the 21st of February, of the present year 1904. Seventh. The mortgage credit above referred to has not been cancelled in the register of property, nor is there any entry in the Journal showing the filing of any document for the cancellation thereof; the property described, according to the Register has not been transmitted to any third person, nor has any mortgage been constituted upon the same, other than that in favor of Mr. Lothrop, which is the object of this suit. So it appears from the certificate issued by the register of property, on the twenty third of the present month and filed herewith under the letter B."

Such are, literally transcribed, all the facts stated by Mr. Lothrop in his writing or complaint instituting against the debtor Torres Zayas the proceeding for the foreclosure of mortgages. Mr. Lothrop filed with the said complaint two documents: One marked with the letter A, which is the same deed referred to in the first allegation of this complaint, and the other marked with the letter B, which was a certificate of the registrar of property showing that the mort-

9 gaged property had not been sold, nor the mortgage cancelled, and that the cancellation thereof was not pending in the registry.

In the same complaint, the facts of which have been transcribed, the plaintiff therewith, Mr. Lothrop, then goes on and states the legal grounds thereof, and concludes by making to the court the following prayer, which literally copied, reads as follows:

"I pray the court to please consider me as the legal representative of Mr. William Sturgis Hooper Lothrop, and to direct that the debtor Don Marcelino Torres y Zayas, be required to make payment within 30 days of the aforesaid amount of four thousand six hundred dollars ($4600.00) of interest due up to the 21st of February last, and of those which at the legal rate should be due thereon up to the date on which payment be made, and to pay the costs, and to warn him that in case he fails to do so the mortgaged property will be sold at auction to secure the payment of said liabilities."

The aforesaid suit brought by Mr. Lothrop, and the documents marked with the letters A and B, referred to therein, were filed in the District Court for the judicial district of Ponce, on the 3rd day of May, 1904. But the eight notes referred to in the deed were not filed with the complaint nor was any other document filed therewith. Nor were said notes produced at any time during the whole course of the said foreclosure proceeding up to the termination thereof.

On the same day, the 3rd of May, 1904, the District Court of Ponce, by virtue of the foreclosure proceeding brought by Mr. Lothrop, issued a writ against Mr. Torres Zayas, who was the only

defendant in said proceeding, the mandatory precept of which literally reads:

"It is directed that Don Marcelino Torres Zayas, a resi-
10 dent of Juana Díaz or any other person who may be legally in charge of the property mortgaged, be required to make payment to the creditor, the plaintiff Mr. William Sturgis Hooper Lothrop, or to his legal representatives in this city, within 30 days, of the sum of four thousand six hundred dollars which he is owing the latter as interest due up to the 21st of February last, and of those which, at the legal rate may become due on said amount up to the moment of making the payment, and to pay the costs, and to warn him that in case he fails to do so the property mortgaged will be sold at auction to secure the payment of said liabilities. And for the proper return of this writ, an order shall be issued to the Municipal Court of Juana Díaz, in accordance with the further prayer of the petition. The Presiding Judge of this Court, Don Isidoro Soto Nussa, is appointed as Examining Judge (Juez Instructor) for this cause. It was agreed upon and signed by the Judges of this Court; and attested by me.—Isidoro Soto Nussa.—R. Sanchez Montalvo.—H. S. Belaval.—Luis Gautier."

It was stated by the said Court of Ponce, in said writ, that the same was issued upon consideration of the facts stated in the complaint filed by Mr. Lothrop, wherein the latter stated that he bound himself to pay whatever damages might accrue to the debtor Torres Zayas caused by any malice or negligence incurred in the faithful statement of the facts contained in his complaint (Mr. Lothrop's); but he did not bind himself in the same manner with regard to the other circumstances which the court should have taken into consideration so as to authorize the proceeding and entertain the same.

The aforesaid writ of the Court of Ponce, of the third of
11 May 1904, on which date the said court was composed of three judges, was subscribed only by two of the judges of the court.

In furtherance of the aforesaid writ of the 3rd of May 1904, the marshal of the court of Ponce required Don Marcelino Torres Zayas, in the form directed in said writ to make said payment; but the co-owner of the land, Da. Mercedes Laborde, was not so required, nor was she ever notified with regard to said proceeding. A copy of said complaint was not delivered, either, to Don Marcelino Torres, nor to any other person on his behalf; nor was the said Torres, or his wife, required to pay any amount whatsoever after the auction sale had taken place, nor was any order or summons of the court served on them during the whole course of said proceeding, with the single exception of the writ issued when the proceeding was instituted, which was served on Mr. Torres, as stated in the foregoing allegation.

After the thirty days given to Mr. Torres Zayas, to make the payment, had elapsed, the court of Ponce, on motion of Mr. Lothrop's counsel, made an order directing the property mortgaged to be sold at public auction for failure of Mr. Torres Zayas to make the payment of the sum claimed by his creditor (then plaintiff) Mr.

Lothrop, within the thirty days given him for such purpose. But this order of the court of Ponce, which appears to have been made on the sixteenth of June of the said year nineteen hundred and four, was authorized and subscribed only by two of the judges of said court, which, at that time, was composed of three judges.

6th. That on the nineteenth of July nineteen hundred and four, the District Court of Ponce made an order directing that execution should be issued in accordance with the writ of the third of May, 1904. And although this writ did not provide for the attachment of the properties, nor the sale thereof at public auction (as it only required the debtor to make payment) nevertheless the mar-
12 shal of the said court of Ponce, without proper order therefor, attached the properties mortgaged of Mr. Torres Zayas, on the 30th of July, 1904, without appearing on the place where they are situated, and then proceeded to sell them at public auction.

In pursuance of the said auction, notices were published in the local paper "The Porto Rico Eagle." A notice was published, for the first time, on the 24th of August, 1904; the second time, on the 31st of the same month and year; the third time, on the 7th day of September of said year; and the fourth, and last time, on the 14th of September, of said year 1904. The auction sale took place on the twelfth of September 1904, that is to say, two days prior to the publication of the last notice. Therefore the notices were published only during the term of twenty days, and the sale took place eighteen days after the publication of the first notice.

The valuation given to the property in said mortgage was not stated in said notices, so that said valuation should be taken as basis for the sale, nor was said valuation taken into consideration for the purpose of the same, nor were the bidders required to pay ten per cent of said valuation. So that the property was sold at first auction without subjection to any rate of valuation.

7th. That on the same day, the 12th of September, 1904, the secretary of the court, after the auction sale had taken place, accepted the offer of the defendant herein Don Pedro Juan Rosaly, for the amount of five hundred dollars, plus the cost of the proceeding, and his obligation to pay the mortgage then constituted upon the property, and said secretary issued a certificate in his favor as title for the Registry of Property; that the return of the marshal shows that the sale was made without objection to any rate of valuation and that it was made on the 18th day after the publication
13 of the first notice, all of which is contrary to law, that the property named "Semil" had a value at that time of one hundred thousand dollars, and that plaintiff was greatly damaged by reason of the said sale of his property for the sum of five hundred dollars.

8th. That afterwards, and without any order of the court of Ponce, the marshal thereof, on the seventh of October, 1905, executed a deed of the property mortgaged and sold, in favor of the defendant Don Pedro Juan Rosaly y Capó, before Don J. Fernandez Corona, a notary public of Ponce; and on the same date, and before the same notary, the defendant Mr. Rosaly Capó constituted a mortgage upon the said property for the sum of thirty thousand dollars

in favor of the mercantile partnership of this city "Lothrop Luce & Co.", who are also defendants in this suit, and the aforesaid deeds have been recorded in the registry of property of Ponce.

9th. That the defendant Mr. Rosaly as well as all the partners of the mercantile partnership Lothrop Luce & Co. had personal knowledge of the facts stated in this complaint, including the fact that the interest due had been paid on, and before the institution of the foreclosure proceeding of said mortgage. That the nullity of, as well as the defects contained in, the title of the judicial sale made in favor of Mr. Rosaly clearly appeared in the registry of property of the District, at the time when Mr. Rosaly constituted the mortgage in favor of the mercantile partnership Lothrop Luce & Co. That Mr. Rosaly, although appearing as purchaser of the property "Semil" and although he had the same recorded in his own name, was actually nothing more than an agent of the plaintiff William Sturgis Lothrop for the purpose of such sale and that the property from the date of said sale actually belonged to William
14 Sturgis Lothrop, and the same actually belongs now to Da. Alice Lothrop, successor to and heiress of William Sturgis Lothrop, always subject to the right of the plaintiff in this suit. And Lothrop Luce & Co., which appears as mortgage creditor with regard to this property, are also nothing more than agents of Mr. William Sturgis Lothrop, who was a partner of the said mercantile partnership, the latter holding said mortgage in trust for Doña Alice Lothrop, successor to and only heiress of William Sturgis Lothrop.

10th. That the plaintiff Marcelino Torres was on the 26th of February, 1901, and still is, the owner of the property "Semil", which belongs to him as a matter of right, although the same appears to be recorded in favor of Don Pedro Juan Rosaly, and is in the possession of the defendants.

11th. That Mr. William Sturgis Lothrop died in the year 1906, his sole heiress being his widow, the defendant Alice Lothrop.

And by virtue of the foregoing allegations, the plaintiffs

Pray- this Hon. Court to render judgment in this suit declaring the law and the facts to be in favor of the plaintiffs and against the defendants, and making further the following declarations:

I. Holding that Don Marcelino Torres Zayas was not bound to pay on the 3rd day of May, 1904, four thousand six hundred dollars as interest due on the 26th of February of the said year 1904; and that notwithstanding, the said Mr. Torres Zayas, on the 3rd day of May 1904, had paid to his creditor Mr. William Sturgis Hooper Lothrop, the aforesaid four thousand six hundred dollars; and that, therefore, the said Mr. Lothrop lacked any right whatsoever to institute on the 3rd day of May, 1904, the fore-
15 closure proceeding hereinabove referred to, which he instituted on said date and carried on afterwards; and that there was malice and negligence in the statement of facts made in the complaint filed in this court by Mr. Lothrop against Mr. Torres Zayas on the said day, the 3rd of May, 1904.

II. Holding that all orders made by the court, all writs issued by the secretary, and all services and returns made by the marshal

and sheriff of the District Court for the Judicial District of Ponce, during the course of the foreclosure proceedings brought by Mr. William Sturgis Hooper Lothrop against Don Marcelino Torres Zayas, which was instituted with the filing of the complaint on the 3rd of May, 1904, which proceeding and complaint have been referred to in the allegations herein made, are null and void and without any effect whatsoever;

III. Holding that the whole of the said foreclosure proceeding is null and void from the beginning up to the termination thereof.

IV. Holding that the certificate issued by the marshal of the court of Ponce in favor of Don Pedro Juan Rosaly, on the twelfth day of September 1904, when the auction sale of the property "Semil" took place, whereby the said property was adjudicated to him by the acceptance of the offer made by him in said sale, is null and void, and holding, further, that such sale is null and void.

V. Holding that the deed of judicial sale executed by the marshal of the court of Ponce in favor of Don Pedro Juan Rosaly y Capó on the 7th of October, 1905, before J. Fernandez Corona, a notary public, and the registration of said deed in the registry of property of Ponce, are null and void.

VI. Holding that the mortgage constituted by Don Pedro Juan Rosaly on the 7th of October, 1905, upon the same property "Semil," in favor of Lothrop Luce & Co., before Fernandez Corona, a notary public, and the registration thereof in the registry of property of Ponce, are null and void.

16

VII. Holding that the said property "Semil" belongs to the plaintiff, who is the legitimate owner thereof, and directing him to be put in possession thereof.

VIII. That in case the court should not consider it to be just to decree that the said property "Semil" be returned to the plaintiff, the court is prayed to adjudge and decree that the defendant, or such defendants as the court should deem liable on account of the facts stated in the complaint, pay to the plaintiff the proper value of the aforesaid property, which, at the present time, is not less than eighty thousand dollars.

II.

As second cause of action, the plaintiff alleges:

First. That with regard to all of the allegations made in the first cause of action of this complaint, from number 1 up to number 11, the plaintiff states them again and makes them a part of this second cause of action.

Second. That the said William Sturgis Hooper Lothrop appropriated to himself the crop of one thousand quintals of coffee produced by the property "Semil" during the months of November and December, 1904, and January and February, 1905, the net and liquidated proceeds of which crop after deducting the expenses, amounted to eight thousand dollars.

Furthermore: that the defendant Mr. Rosaly, as agent of William Sturgis Lothrop, appropriated to himself and sold the crop of coffee produced by the said property, which amounted to one thousand and

three hundred quintals of coffee, during ...is of November
and December, 1905, and Janu... ...uary, 1906, the
17 net and liquidated proceeds of sa... ...deducting the
expenses, amounted to ten thousa...

Furthermore: that the defendant Mr. L... ...of William Sturgis Lothrop appropriated to himself, ... coffee crop produced by the said property, which am... ...thousand five hundred quintals, during the months of ...d December 1906, and January and February, 1907, ...liquidated proceeds of said crop, after deducting the e... ...nted to twelve thousand dollars.

And by virtue of the foregoing allegations, t...

Prays this Hon. Court to render judgment in ...laring the law and the facts to be in favor of the plaint... ...t the defendants, and holding as follows:

1st. Directing Doña Alice Lothrop, as heiress of W... ...gis Lothrop, to pay over to the plaintiff the eight th... ...rs, amount of the proceeds of the coffee crop of the afo... ...y, during the months of November and December, 1904 ... and February, 1905, and the twenty two thousand dolla... the proceeds of said property during the months of N... December 1905, January and February, 1906, Nov... December, 1906, and January and February, 1907.

2nd. That in case the court should consider it more pr... furtherance of justice, to direct Don Pedro Juan Rosaly ... instead of Da. Alice Lothrop, to pay over to the plaintiff th... two thousand dollars amount of the proceeds of the property ... during the months of November and December, 1905, Janua... February, 1906, November and December 1906, and Januar... February, 1907.

III.

And as third cause of action, the plaintiff alleges:

18 First. That with regard to all of the allegations made in the first cause of action of this complaint, from number 1 up to number 11 the plaintiff states them again and makes them a part of this third cause of action.

Second. That on account of the foregoing facts, the plaintiff has suffered mentally, and has been materially damaged, having been deprived of his property and bound to live with very scarce means, his credit being lost and being compelled to apply himself to hard work so as to support his family, which damages he estimates in the sum of twenty thousand dollars.

And by virtue of the foregoing allegations, the plaintiff

Prays this Hon. Court to render judgment in this suit, declaring the law and the facts to be in favor of the plaintiff and against the defendants, and adjudging as follows:

Directing Doña Alice Lothrop sole heiress of William Sturgis Lothrop, to indemnify the plaintiff in the sum of twenty thousand dollars as damages for the moral sufferings and material loss sus-

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tained by him on account of the facts above stated, and to impose the costs upon the defendants.

BOERMAN & LLORENS,
Counsel for Plaintiff.

Service of the foregoing amended complaint as well as of the exhibit filed therewith accepted on this 15th day of January, 1908.

JOSÉ TOUS SOTO,
Counsel for the Defendants who Appeared.

Filed January 15th, 1908.

F. BARNÉS, *Secretary.*

19 EXHIBIT No. 1.

Total Cancellation and Constitution of a New Mortgage, No. 91.

At the city of Ponce, Island of Porto Rico, this twenty sixth day of February, 1901, before me, Don Rosendo Matienzo Cintrón, attorney-at-law, and a Notary Public, member of the Association of the Province, a resident of this city, with an office in the same, and before the witnesses to be named later on, appear:

Don Marcelino Torres y Zayas, a resident of the town of Juana Díaz, temporarily residing in this city, married, property owner, farmer, and forty three years old.

Don Rafael Collazo y Perez, and Don Antonio Perez Guerra y Goicoechea, both residents of this city, married, property owners, and fifty one and fifty years old respectively.

And Mr. Henry De Ford y Baker, a resident of the city of Boston, U. S. of North America, residing at the present time in the town of Salinas, and a sojourner in this city of Ponce, a merchant and banker, and of age; on account of the ignorance of the latter of the Sanish language, he appears accompanied by Don Pedro Juan Rosaly y Capó, a resident of this city, married, of age, and property owner, who is to act as interpreter.

The foregoing parties state that they appear, the former in his own behalf, the second and third on behalf of the mercantil- partnership doing business in this city under the firm of Collazo Perez Guerra & Co., of which both are the only partners and managers,

with power to use the name of the firm, as appears from the
20 contract executed in this city, by a public deed, before Don Rafael León, a notary public, on the 20th of September, 1877, and of the deeds extending the term of said contract, also executed in this city: the first of said deeds having been executed on the 25th of August, 1879, under No. 355, before Don Joaquín Mayoral, a Notary Public; the second deed was executed on the 28th of July, 1883, under No. 242, before Don Rafael León, a Notary Public, acting as substitute for the Notary Don Joaquín Mayoral; the said deed was executed under No. 219, on the 20th of July, 1889, before the said Don Joaquín Mayoral, Notary Public; the fourth deed was executed

under No. 378, before the said Notary Don Joaquín Mayoral, on the 15th of July, 1893; and the fifth deed was executed under No. 411, before the Notary Don Rafael León, acting as substitute for the undersigned Notary, on the 31st day of May, 1899.—The following quotation is taken from the latter of the aforesaid deeds extending the term of the partnership, the original of which has been shown to me for the purpose of this deed, to wit: "Extension of term of " partnership.—No. 411.—At the city of Ponce island of Porto Rico " this 31st day of May, 1899, before me, Don Rafael León y Paz, " a notary of the Association of the Province, residing in this city " and having his office therein, acting as substitute for the Notary " Don Rosendo Matienzo Cintrón, attorney-at-law, now on leave of " absence; before the witnesses to be named later on, Appear:— " Don Rafael Collazo y Perez, a resident of this city, married, a mer- " chant and fifty years old.—And Don Antonio Perez Guerra y " Goicoechea, also a resident of this city, married, a merchant and " forty seven years old.—I certify with regard to the personal knowl- " edge, professions and residences of the parties appearing herein,
" who assure me to be in the full enjoyment and exercise of
21 " their civil rights; and having, in my opinion, sufficient
" legal capacity for the execution of this deed, state the fol- " lowing facts:—Then follow a statement of facts and afterwards " the following clauses:—First.—The partnership will continue " doing business in this city under the firm name of Collazo Perez " Guerra & Co., which the partnership has been using since its con- " stitution, and shall carry on the same business done by said part- " nership up to the present time, that is, the grocery business at " wholesale and retail, and to the purchase and sale of domestic " fruits, and to exploit and cultivate the lands possessed by said part- " nership.—Second: The appearing parties mutually agree to extend " the term of such partnership for an unlimited period, which will " begin to run from the 28th day of July of the present year, when " the term of the last extension of time agreed upon will expire, but " the partnership may be dissolved upon petition of one of the mem- " bers thereof, at the expiration of one year of the extension of time " hereby agreed. If the partnership goes on doing business after " the expiration of the first year of the extension hereby agreed, it " may be dissolved also upon petition of any of its members, but " the dissolution of the partnership, will take place precisely at the " expiration of any of the successive years in which the petition for " dissolution of the partnership be made.—Third.—The manage- " ment, direction and administration of the partnership, will be, as " usual, in charge of both partners, who, as only owners and man- " agers thereof will have indiscriminately the use of the firm of the " partnership for the purpose of all transactions and business thereof, " but not for the purpose of furnishing bonds or securities of any " kind without previously agreeing with regard thereto.—Then fol-
" lows others clauses and the deed concludes as follows:
22 "The deed having been read by the same in exercise of
" their rights, and in the presence of the witnesses Don " Felix Tarascó and Don José Cuevas, both residents of this city

"and personally known to me, the parties approve and ratify the "same in all its parts, and sign the same as well as the witnesses, "before me, the undersigned notary who certifies with regard to "all the facts stated in the present deed.

"RAFAEL COLLAZO.
"A. PEREZ GUERRA.
"FELIX TARASCÓ.
"JOSÉ CUEVAS.
"There is a Rubric."

"(Signed) RAFAEL LEON.

The foregoing is a faithful transcription of the proper part of the original thereof, to which I hereby refer, and with regard to which the parties assure me that proper notice has been taken in the Commercial Registry of this city.

And the fourth party, that is to say, Mr. De Ford, appears on behalf of Mr. William Sturgis Hooper Lothrop, a resident of the city of Boston, state of Massachusetts, married, a merchant and of age, by virtue of the general power of attorney conferred on him on the 14th of March, 1899, signed and ratified on the same day before the Notary of the said city of Boston, Mr. Robert T. Wesvick; the original of said power-of-attorney which has been shown to me, appears to be written in the English language, and for that reason a translation thereof into the Spanish language has been produced, which literally copied reads as follows: "Know all men by these "presents:—That I, William Sturgis Hooper Lothrop, of Boston, "state of Massachusetts, United States of America, hereby constitute "and appoint Henry De Ford, until very recently a resident of the "said city of Boston, and now residing in Porto Rico, to be my true "and legal attorney-in-fact, to have in my representation and behalf "a complete and full administration and disposition of my real and "personal property, matters and properties of any kind and
23 "nature, wherever the same might be found and to do, "execute, grant, receive, deliver, sell, mortgage, pledge, loan, "convey, transfer, pay and receive and execute, all and every acts, "documents, writings, moneys, properties, real and personal prop-"erties, rights and privileges, and interests of whatever kind and "nature as if done, executed, granted, received, delivered, sold, "pignorated, conveyed, transferred, paid or received by myself; to "sign on my behalf and representation, all and every document "necessary to be signed and of whatever nature; to make contracts "and contract obligations and to pay them, including particularly "notes and negotiable papers and bills of exchange; to bring and "demand before the court, and to defend therein all matters and "suits necessary to be brought and defended, and to act in this line "and in any other line, in my behalf and representation, in all "occasions and for all purposes, as fully and effectively as if I were "personally present in the execution of said acts and acting by "myself. Although I have intended to include in the foregoing "all power that I may confer or delegate, I expressly confer unto

" my said attorney full power and authorization to do in my name
" and representation all acts, execute and deliver all and every docu-
" ment and deed which may be necessary or proper, including par-
" ticularly the execution of mortgages, transfer or discharge of
" mortgages upon lands, and transfer or lease of such properties and
" all other acts which may be necessary for the better administration
" thereof, and also to receive and execute receipts and sell all my
" personal effects, transfer to third persons, of whatever kind and
" nature, which might belong to me, particularly and expressly in-
" cluding stocks, bonds, vested rights, government bonds, bills of
" deposits and certificates, or deeds of property, which I now
24 " possess or may possess while this power is in force, as well
" as to do all and any kind of subscription in my name and
" representation, which I may have to do by reason of having or
" possessing financial share in stocks, coupons, certificates or deeds
" of property, government bonds, vested rights, receipts of deposits,
" or any other personal property which I possess, expressly including
" hereby the rights to subscribe to any issue of stock which I may
" have a right to subscribe by vested rights, with full power to execute
" personally the payment of said subscription; also to collect and
" issue receipts for all the amounts or moneys, dividends or property
" of whatever kind and nature, expressly including the right to
" indorse registered bonds and coupons, in my name, for the col-
" lection or transfer thereof.—Also to receive and issue receipts of all
" property which now belongs to me or may belong to me, and which
" may be given, deposited or held as collateral security for the pay-
" ment of any notes or any other obligation constituted by me, as
" well as to substitute any property belonging to me which he may
" have in his power as he may see fit; with full power to place the
" substituted property under the same conditions stated in said obli-
" gation. And at the same time with full power and authority to
" carry on in my name and representation the banking business in
" all regards, including to make and renew loans on the conditions
" and rate of interest, with or without security, according to the
" opinion of my said attorney, with full power to accept and receive
" in my name, issue receipts in the same manner, sell, change and
" deliver the collateral securities or any other which may come into
" his hands in the course of said banking business.—And at the
" same time the right to endorse and sign in my name, and
" bind me personally as well as my property as far as
25 " it may be necessary and proper for the purposes of this
" power and with the rights to execute all the acts which may
" be necessary to do, in my representation, although not expressly
" authorized in the foregoing.—It being my will to have my said
" attorney act as fully and effectively as if I were personally pres-
" ent.—And so as I am attorney-in-fact for any other person or
" persons, I hereby appoint the said Henry De Ford my substitute
" for every and all power which I have or may have and I transfer
" and delegate unto him all of said powers with regard to the exercise
" or proper exercise thereof in the island of Porto Rico.—This power
" will be in force up to September 1st, 1903.—In testimony whereof

"I hereunto affix my hand and seal at Boston, Massachusetts, "United States of America, on this 14th day of March, 1899.— "(Signed) William Sturgis Hooper Lothrop.—There is a seal.— "State of Massachusetts.—Boston March 14th, 1899.—County of "Suffolk.—Before me appear the above mentioned William S. Lo- "throp of whom I certify to be the person who executed the fore- "going document, and signed the same before me, declaring that he "executed the same freely and voluntarily.—Before me.—Signed.— "Robert F. Herrick.—Notary Public.—There is a seal. Attesta- "tion.—Joseph A. Villard, of Boston, in said county, duly elected "and constituted as clerk of the Superior Court, for and within the "said County and State, residing at Boston, in the said County, the "said Court being a court of record, with a seal hereunto affixed, "and in furtherance of my duty as clerk aforesaid, I certify and "attest: That Robert F. Herrick, before whom the attached execu- "tion, proof or deed was taken and subscribed, is a notary public, "for and including all the State and has authority to execute and
"take agreements, proofs and deeds in all the counties of
26 "the said State and to act as such; and being also authorized
"to take executions and certify proofs and deeds of convey- "ances of lands, buildings, and hereditaments, existing within the "said State, in any part thereof wherever they may be situated, "and that he was, at the time of making the execution, proof or "deed, hereto attached a notary public, that proper faith and credit "are and should be given to his official acts; that I am well ac- "quainted with his signature and handwriting and truly believe "that the signature fixed to the aforesaid attached deed is genuine, "and further, that said power is made and executed according to "the laws of the State.—Given under my hand and the seal of said "court at Boston, the said County and State, on this 14th day of "March, 1899.—Signed.—Joseph A. Villard.—There are two seals "affixed thereon."

The foregoing is a true and faithful copy of the original thereof, to which I hereby refer, and which has been returned to Mr. De Ford, who assures me that said power of attorney has not been revoked, suspended or limited in any way whatsoever, but, on the contrary, it has been ratified by instructions recently received by him from his principal.

I hereby certify with regard to the personal knowledge, profession and residence of the parties appearing herein, who assure me to be in the full enjoyment and exercise of their civil rights; and having, in my opinion, all of them, sufficient legal capacity for the execution of this instrument, they state the following facts:

First. Property: That the contracting party herein, Don Marcelino Torres y Zayas, is owner in full ownership of two real properties described as follows:

Number one. A coffee plantation named "El Semil," situated
in the ward of Villalba-arriba, in the Municipal jurisdiction
27 of Juana Diaz, covering an area of five hundred and thirty
five cuerdas and sixteen hundredths, equivalent to two hundred and ten hectares fifty three ares and ninety two centiares,

having at the present time the following establishments thereon: a wooden dwelling house, covered with zinc; another house of the same construction for a store; a wooden ware-house, covered with zinc, for the storage of fruits with special arrangements for the drying thereof, on the ground floor; a hulling-machine for coffee; a shed for laborers and twelve small wooden-houses covered with zinc, as dwellings for the laborers' families. The said property is bounded on the North by a public road and by lands belonging to Juan Felix Baez, Socorro García and to the Succession of Don Severo Segarra; on the East, by lands belonging to Don Domingo Olivieri, Succession of Catalina Matos, Lucas Negrón, Julian Negrón, to the said Don Domingo Olivieri, to the succession of Juan Angel Rosario, to Tomasa Negrón, and José Torres; on the South, by land belonging to Don José Genaro Rivera, Don José del Carmen and Da. Dominga Negrón, to Don Marcial Serrallés, Eduvigis Rodriguez, Ramón Sanchez, Pedro Morales and to Don Antonio Santí; and on the West, by a public road and lands belonging to Don Juan Zaragoza, Don José del Carmen Negrón and to the succession of Don Severo Segarra.

And number two: Land without any denomination, situated in the same ward of Villalba-arriba, in the Municipal jurisdiction of Juana Díaz, covering an area of sixty three cuerdas and sixteen hundredths, equivalent to twenty four hectares, eighty two ares and forty three centiares, which land is partly planted with coffee and the remainder with pasture and briers, having at the present time only a wooden warehouse covered with zinc with special arrangements for the drying of fruits, and a house of the same construction used as a store. This property is bounded on
28 the North by land of the succession of Simón Alvarado, Liberata Olivencia and Ramón Zayas; on the South, by lands of the succession of Andrés Negrón; on the East, by lands of the succession of Juan Ramón Rodriguez and the succession of Luciano Torres; and on the West, by the brook named Semil, and lands of Dolores Torres.

Second. Title: That the two properties above described were acquired by the party, the said Mr. Torres y Zayas, by virtue of an adjudication made in his favor in payment of a mortgage credit of fifty thousand dollars and in payment of another chattel mortgage of four thousand five hundred and thirty four dollars and fourteen cents, which adjudication was made to him by Messrs. Collazo Perez Guerra and Co., merchants of this city, by a public deed number 90, executed before the undersigned attorney, in this city and under this date, the original of which I have before me for the purpose of this instrument, which deed has not yet been recorded in the Registry of Property of the District, on account of the lack of sufficient time to file the same therein, but the said Mr. Torres Zayas binds himself to comply with that requirement before the present deed is filed for registration in said office.

Third. Property: That Messrs. Collazo, Perez Guerra & Co. are in turn legitimate owners of the property described as follows: Land (named "Monserrate") situated in the ward of "Maraguez",

within this Municipal jurisdiction, covering an area of three hundred and ninety cuerdas, of pasture, briers and mountain lands, equivalent to one hundred and fifty three hectares, twenty eight ares and fifty three centiares, with a wooden dwelling-house covered with zinc, a wooden ware-house covered with galvanized iron, and two houses for laborers. This property is bounded on the North by lands of José Suarez Don Francisco Fournier, Don
29 Amadeo Acosta, Don Manuel Suarez, the succession Vazquez and Antolino 2do.; on the East, by lands of Don Ramón Albisu, Don José Ma. Ramirez, Don Francisco Rubert, succession of Don José Ma. Rodriguez, and Don Guillermo Fournier; on the South, by lands now belonging to Don Juan Fournier; and on the West, by lands belonging to Don Francisco Fournier, Don Juan E. Rivera and Don Santos Rosa.

Fourth. Title: That the property lately described was acquired by the aforesaid partnership by purchase of two different portions thereof:

One to Don Joaquín Alce y Goicoechea and the other to Don Guillermo Fournier y Toro, as shown by the deed executed in this city before Don Joaquín Mayoral, who was a notary public of said city, on the sixth day of April, eighteen hundred eighty nine, which document was recorded in the Registry of Property of the District, with regard to the merger in one property of the two portions acquired thereby, on folio 29 of Book 53, of this Municipality, property No. 2453, 1st. registration thereof.

Fifth. Burdens: That from the titles which have been produced as well as from the statements made by the contracting parties, it appears that the property named "Monserrate", described in the foregoing third fact, is free from all mortgages, census, and encumbrances; but with regard to the other two properties described in the first fact, the following mortgage has been constituted thereon: By a deed No. 625, executed before the undersigned notary, in this city, on the 21st of November, 1898, Mr. William Sturgis Hooper Lothrop, a resident of Boston, made a loan to Messrs. Collazo Perez Guerra and Co. for the amount of forty thousand dollars, U. S. currency, for the term of four years to be due on the 21st of November, 1902, and at the annual rate of interest of
30 ten per cent, which amounts the debtors bound themselves to pay to the creditors, in American money, or the equivalent thereof, in any other legal currency in this island, as follows: One thousand dollars on the twenty first of February of last year 1899; four thousand dollars on the same date and month of each of the ensuing years 1900, 1901, and 1902, and three thousand dollars on the 21st of November, of the same year "nineteen hundred", which is the date when said mortgage becomes due, which mortgage was extended for such amount as was necessary to cover and secure the interest, for such term as allowed by law to the prejudice of third parties, and to cover two thousand dollars more, U. S. Currency, for costs and judicial expenses in case of foreclosure; the liability of the property described under No. 1 being fixed at thirty six thousand dollars, U. S. currency of principal, and made to

cover the interest of the whole principal and one thousand dollars for costs; and that of the property described under No. 2 was fixed at four thousand dollars U. S. Cy. of principal and made to cover the remaining one thousand dollars for costs. So it appears from the deed of the aforesaid mortgage the original of which has been shown to me for the purpose of this instrument; but a copy thereof, as stated by the contracting parties, has been recorded in proper time in the Registry of Property of the District. Inasmuch as the aforesaid mortgage is to be cancelled by the present deed, the above mentioned properties described under numbers one and two, will be thereby free from all mortgages, census and encumbrances.

Sixth. Value: That the contracting parties have mutually agreed, in the character under which they appear, to fix the value of said properties, for the purpose of this contract, in the sum of fifty one thousand dollars, that is to say: the value of the property
31 described in the first fact under No. 1, is fixed at Forty thousand dollars; that of the property described in the said first fact under No. 2, is fixed at six thousand dollars; and that of the property described in the third fact is fixed at five thousand dollars; the parties expressly waiving whatever rights they may have to make a new valuation or whatever action they may have with regard thereto.

Seventh. That Don Marcelino Torres y Zayas, having acquired the two properties described in the first fact under Nos. one and two, with the obligation to pay to Mr. William Sturgis Hooper Lothrop the mortgage constituted thereon in favor of the latter, and which mortgage amounts at the present time, together with the interest unpaid and due thereon, to the sum of forty six thousand dollars and the said Torres Zayas, being unable to pay said amount and the interest which may become due thereon, at the expiration of the instalment stipulated, the contracting parties have agreed, that Mr. De Ford y Baker, in the character under which he appears herein, shall allow Mr. Torres a longer term for the payment of said amount, at the same rate of interest of 10%, and with the security of a first mortgage upon the two properties now liable for the said credit, and besides upon the real estate named "Monserrate", described in the third fact, which is the property of Messrs. Collazo Perez Guerra & Co., the latter agreeing thereto in order that Mr. Torres may be granted a longer time for the payment of the said obligation.

And inasmuch as the said agreement modifies almost entirely the aforesaid mortgage, they have agreed to totally cancel the same and to constitute a new mortgage for the aforesaid amount of forty six thousand dollars for the term, at the rate of interest, and under the conditions to be stipulated later on and with the security above mentioned.

32 And in order to carry out the aforesaid agreement and to make the same in an authentic form and give it proper legal effect, the contracting parties execute the present deed, under the following clauses:

Total Cancellation.

First. The contracting party Mr. Henry De Ford y Baker, in the name and representation of his principal Mr. William Sturgis Hooper Lothrop, by virtue of the aforesaid agreement and without having received the forty six thousand dollars which for principal and interest the other contracting party, Don Marcelino Torres y Zayas, is owing to his principal, on account of the voluntary mortgage constituted by the deed referred to in the fifth fact, and dated the twenty first of November, 1898, and on account of the purchase made by him of the two mortgaged properties, and in order to include the amount thereof in the new mortgage which is to be constituted, agrees to consider hereby extinguished and properly cancelled the aforesaid mortgage of the twenty first of November, 1898, agreeing and consenting also to the proper cancellation of the registration made with regard thereto in the Registry of property of the District, in whatever legal form may be proper.

Voluntary Mortgage.

Second. Don Marcelino Torres y Zayas declares and admits that he owes to Mr. William Sturgis Hooper Lothrop the amount of forty six thousand dollars, on account of the mortgage which has been cancelled by the foregoing clause, and for the amount of which he hereby gives proper receipts in favor of his creditor. Thereupon.

I, the undersigned notary warn him that he cannot make any
33 exception whatever against the said admission, and that the properties to be mortgaged will remain liable and subject to the obligation of this contract, and the mortgage credit will be free from all liabilities even if it should be shown later on that the admission of said debt was not true either in whole or in part.

Third. This mortgage is constituted for such a term as, counted from to-day, will become due on the 21st of February, in the year 1905.

Fourth. The capital owed will bear interest, from this day up to the final and total payment thereof at the annual rate of ten per cent which the debtor will pay to the creditor on the 21st of February of each year, without failure, excuse or pretext whatsoever.

Fifth. The forty six thousand dollars, amount of the principal owed, shall be paid by Don Marcelino Torres Zayas, in this city of Ponce, to the creditor Mr. William Sturgis Hooper Lothrop, or to his legal representatives, on the aforesaid date of the 21st of February in the year 1905.

Sixth. In case a cyclone or any other unforeseen event should occur the decision with regard to the payment of the principal and interest thereon at the expiration of the installments agreed upon, shall be submitted to the judgment of amicable compounders to be appointed one by each party, and the two so appointed shall elect another in case of disagreement.

Seventh. It is agreed that the forty six thousand dollars, amount of the principal of this mortgage, will be represented by eight notes, to be made in favor and to the order of the creditor and for the

amount of five thousand seven hundred and fifty dollars each, bearing interest at the rate of ten per cent per annum, and to become due all of them on the 21st of February 1905, which is the
34 date of the expiration of this mortgage.

Eighth. The creditor is given the power to inspect, either by himself or through agents, the properties described under Nos. One and Two, whenever he should see fit to do so, in order to determine if they are kept in good condition of cultivation.

Ninth. The contracting parties agree that all the produce of the two properties firstly described shall be delivered to Messrs. De Ford & Co. of this city to be sold by them at the highest price that can be obtained in this market, so as to deduct from the value of said produce the amount of the interest which shall be paid annually to the creditor, and the balance, if any, shall be delivered to the debtor Mr. Torres Zayas, for the expenses and maintenance of the said properties, the latter being bound to apply to the payment of the principal of the debt such sum as may exceed the amount of said expenses.

Tenth. All kinds of taxes which may be imposed upon the principal and interest thereon, while this mortgage remains in force, shall be for the exclusive account, charge and risk of the debtor, Mr. Torres y Zayas, who shall pay also the expenses which may be incurred on account of this deed, the copy thereof and the registration of the same in the registry of property of the District, as well as those which may be caused by the partial or total cancellation thereof, when the same shall be made.

Eleventh. In order to guarantee the payment of the forty six thousand dollars owed, the contracting parties, Don Marcelino Torres Zayas, in his own right, and Don Rafael Collazo y Perez, and Don Antonio Perez Guerra y Goicoechea, in the name and representation of the partnership Collazo Perez Guerra and Company, constitute a first and voluntary mortgage, for the aforesaid amount, in
35 favor of the creditor Mr. William Sturgis Hooper Lothrop, the former upon his two properties described in the first fact under numbers One and Two, with all their appurtenances; and the second and third upon the estate "Monserrate," which has been described in the foregoing third fact, including also all the appurtenances thereof; the said mortgage being extended for such amounts as may be necessary to cover and secure the payment of the interest stipulated thereon, for such term as allowed by law to the prejudice of third parties, and to three thousand dollars more for costs and judicial expenses in case of foreclosure; and the said property will be subject to this burden until this mortgage shall be totally cancelled. It is agreed that the property described in the first fact under No. One shall be liable for the amount of thirty seven thousand dollars of principal for the interest of the whole principal up to the amount allowed by law to the prejudice of third parties, and for two thousand dollars for costs; the property described under No. Two, in the aforesaid first fact, shall be liable for the amount of four thousand dollars of capital and for the remaining one thousand dollars allowed to cover the costs; and the estate "Monserrate" described in

the first fact shall be liable for five thousand dollars, which is the balance of the capital owed.

Twelfth. The contracting parties, in the character under which they appear, designate this city and expressly submit themselves to the judges and courts thereof for all acts and proceedings which may be originated by reason of this deed, waiving whatever rights they may have by virtue of any other domicile.

Thirteenth. The contracting parties Don Marcelino Torres y Zayas, in his own right and Mr. Henry De Ford y Baker, in the
36 character under which he appears, perfectly acquainted with the contents of this deed and in so far as their respective interests therein are concerned, accept this deed in all its parts inasmuch as the same is in full accord with their own agreement.

And finally, I, the undersigned notary, inform the parties herein that although they have a right to stipulate the interest on the mortgage without subjection to any legal rate, the only interest secured thereby are those stipulated in the present deed and those which may be mentioned in the registration thereof in the registry of property of the district, and the creditor can only demand, by a real action derived from his mortgage to the prejudice of said parties, the interest which may be due for the two years last past and such parts as may be due for the current year, although he shall have a right to bring a personal action against his debtor to require payment of such interest as may be due for the years prior thereto, and to demand, in a proper case, that the mortgage be extended or enlarged to cover proper interest.

That each of the properties mortgaged is only liable to the prejudice of third parties for the amounts respectively assigned to them, but the creditor shall have a right to proceed against any of them to recover the difference in case any of such properties should not satisfy the total of the debt assigned to the same, where no prejudice to third parties may be caused thereby, all in accordance with the mortgage law now in force.

That in favor of the state, the province, and the municipality of Juana Díaz and of this city, a preferred legal mortgage over that of any other creditor is constituted for such amount as may be necessary to secure the payment of an annual tax upon the proper-
37 ties, which has become due and has not been paid.

And that the present deed shall be recorded in the registry of property of the district, otherwise the same shall not prejudice rights of third parties nor be admitted in any court, council or office of the government, unless in such cases and such manner as may be allowed by law.

Under the foregoing clauses the contracting parties execute the present deed of "total cancellation and constitution of a new mortgage," and bind themselves to keep and comply with the same in proper form.

The contracting parties, Messrs. Torres y Zayas, Collazo y Perez, and Perez Guerra y Goicoechea, having read this deed, and the latter having been translated by Don Pedro Juan Rosaly y Capó into the English language, which is the language known to Mr. De Ford y

Baker who is not acquainted with the Spanish language, all in the presence of the witnesses Don Augusto Jordán and Don Oriol Passarell, residents of this city and personally known to me, the said contracting parties approve and ratify the same in all its parts, and they, and the aforesaid witnesses, sign the same before me, the undersigned notary, who hereby certifies with regard to every fact stated in the present deed.

MARCELINO TORRES.
COLLAZO PEREZ GUERRA & CO.
A. PEREZ GUERRA.
HENRY DE FORD.
E. J. ROSALY.
ORIOL PASSARELL.
AUGUSTO JORDÁN.

(Signed) ROSENDO MATIENZO CINTRÓN.
Attorney at Law.

There is rubric, and an internal revenue stamp of one dollar, properly cancelled, affixed thereto.

NOTE.—On the sixth day of March of the same year I issued a first copy of this deed to Mr. Henry de Ford y Baker, in his character of agent of Mr. William Sturgis Hooper Lothrop, covering fourteen sheets of paper of common use.

Attest:

MATIENZO.

There is a rubric.

38 The foregoing is a true and faithful copy of the original thereof, number 91, to which I hereby refer, which is on file in the protocol of public instruments of the year of its execution, of this Notarial Office now in my charge as substitute of the Notary Matienzo Cintrón, who is now absent.

In witness whereof and by petition of Don Marcelino Torres Zayas, debtor, I hereby issue this copy, which is the first copy issued to him, covering 14 sheets of paper of common use, and hereunto affix my signature and rubric, at Ponce, this 23rd day of April, 1904.

ANGEL ACOSTA.

A true copy.

BOERMAN AND LLORENS.
Counsel for Plaintiff.

39 *Demurrer to the Complaint.*

In the District Court for the Judicial District of Ponce, P. R.

MARCELINO TORRES ZAYAS
vs.
LOTHROP, LUCE AND CO., PEDRO JUAN ROSALY, and ALICE LOTHROP.

Action to Obtain the Annulment of a Proceeding to Foreclose a Mortgage, etc.

Demurrer to the Complaint.

Now come, before the Hon. Court, the defendants Lothrop Luce & Co., and Pedro J. Rosaly, by José Tous Soto, their counsel, and as demurrer to the complaint, allege:

First. That the complaint does not state sufficient facts to constitute a cause of action against the defendants now appearing.

Second. That several causes of action have been improperly united. Indeed, the action for annulment of proceeding and judicial sale, affecting only the rights of Rosaly and Mrs. Lothrop, has been improperly united with the action for the annulment of the mortgage constituted by Rosaly in favor of Lothrop Luce & Co., the latter affecting only the right of the contracting parties therein and not those of Mrs. Lothrop, which latter action is originated from a transaction entirely different from that which may give rise to the first cause of action.

The action or actions for damages claimed from Mrs. Lothrop have also been improperly united with the other actions brought in the complaint, inasmuch as the former actions do not affect the rights either of Rosaly, or of Lothrop & Co.

Third. That the actions for damages are barred by the
40 Statute of Limitations, inasmuch as more than one year has elapsed since the cause of action originated according to section 1869 of the Civil Code.

That the actions for the annulment of proceedings are barred by the Statute of Limitations because they have been brought after the termination of the foreclosure proceedings, and because they are brought in prejudice of third parties and after the lapse of one year since the time when the causes of such actions originated; all in accordance with section 37, last paragraph, of the Mortgage Law, section 140 of the Code of Civil Procedure and number 3, paragraph 6th of section 175 of the Rules for the Execution of the Mortgage Law.

JOSÉ TOUS SOTO,
Counsel for the Defendants Now Appearing.

Service accepted on this 23rd day of January, 1908.

BOERMAN AND LLORENS,
Counsel for Plaintiff.

Filed on this 24th day of January, 1908.

F. BARNÉS, *Secretary.*

41 *Decision of the Demurrer to the Complaint.*

In the District Court for the Judicial District of Ponce, P. R.

MARCELINO TORRES ZAYAS
vs.
LOTHROP, LUCE & Co. et al.

Demurrer to the Complaint.

As shown by the complaint, it appears that in the year 1901, the plaintiff executed a mortgage deed with regard to the plantation "Semil", in favor of Mr. Lothrop. According to the deed, the interest thereon should be paid on the 26th of February of each year. That the interest due up to the 26th of February, 1904, was duly paid to Mr. Lothrop, that is to say, to his legal representative Messrs. De Ford & Co. That Mr. Lothrop brought the foreclosure proceedings to collect his mortgage on May 1904, alleging failure of payment of the interest due thereon. That several irregularities occurred in the foreclosure proceedings. That the defendant Rosaly had knowledge of the fact that all interest due had been paid; and that notwithstanding said knowledge he purchased the estate at public auction.

In the opinion of the court, the irregularities occurring in the proceedings lack importance. It has not been alleged that such irregularities have caused damages to the plaintiff; and it seems that the latter is now in the same condition as he would be if the foreclosure proceedings should have been followed strictly in accordance with the rules of civil procedure. As a result of the proceedings, the plaintiff lost the possession of the property; but the same thing would have happened, if no irregularities had
42 occurred therein. Still the complaint states sufficient facts to constitute a cause of action. If the interest due on the 26th of February, 1904, was truly and actually paid to Mr. Lothrop or his representatives; if Mr. Lothrop had knowledge thereof, or had the duty to have such knowledge; and if Mr. Rosaly purchased the estate at public auction knowing that said interest had been paid, there is a perfect cause of action. The case comes under the decision rendered by the Supreme Court of Porto Rico in the case of Gimenez vs. Brenes, vol. 3, Castro's reports, page 75. It is plain and undeniable that a mortgage creditor cannot foreclose a mortgage knowing that no failure in the payment of interest has been incurred. Nor the title given to the purchaser at a judicial sale would be valid, if the latter knows that the debtor has not failed to make proper payment of said interest.

The allegation that the members of the partnership Messrs. Lothrop Luce & Co. had personal knowledge of the fact that the interest due has been paid is of great importance to determine their rights. If such allegation is true, and if the allegation made with regard to the defendant Rosaly is also true, the deed executed by

the latter in favor of Lothrop Luce & Co. is null and void. If the allegation made with regard to Lothrop Luce & Co. is not true, every possible protection will be afforded to said gentlemen.

In short, the complaint states sufficient facts to constitute a cause of action against the defendants Rosaly and Lothrop, Luce & Co. The second and third causes of action, stated in the complaint, have connection only with the manner of determining the damages. The allegations therein stated are not of importance at the present time, and may be discussed when the time to determine such damages arrives. In short:—the demurrer for insuf-
43 ficiency is dismissed. And the court notifies the defendant Rosaly that he should file an answer admitting or denying the payment of interest due on the 26th of February, 1904; and admitting or denying his personal knowledge with regard to said payment; and setting out, also, any other defense allowed by law. The defendants Lothrop Luce & Co. should file a proper answer. Said answer should be filed within ten days from this date. The costs of the demurrer are hereby imposed upon the defendants.

Ponce, P. R. February 10th, 1908.

MARTIN E. GILL,
District Judge.

44 *Answer.*

In the District Court for the Judicial District of Ponce, P. R.

MARCELINO TORRES ZAYAS
vs.
LOTHROP, LUCE & Co. et al.

Annulment of a Foreclosure Proceeding, etc.

Answer.

Now come before the Hon. Court, the defendants Lothrop Luce & Co. and Pedro J. Rosaly, by José Tous Soto, their counsel, and as answer allege:

With regard to the first cause of action:

First defense. The complaint does not contain sufficient facts to constitute a cause of action against the defendants now appearing.

Second defense. Specific denial.

First. We accept the correlative fact of the complaint.

Second. We deny the correlative fact of the complaint, though we accept that payments were made on the 26th of February, 1902 and 1903, as stated therein.

Third. We deny the correlative fact of the complaint, though we accept as true the contents of the Ninth clause referred to therein.

Fourth. We deny the correlative allegation; though we admit that the principal of the mortgage credit was distributed into eight notes to become due on the date stated therein.

Fifth. We deny the correlative fact of the complaint, though we admit that the complaint transcribed therein was filed. Be-
45 sides, we allege in opposition to this fact, that the notices advertising the sale were published in the numbers 803, 809, 815, and 821, of the paper "The Porto Rico Eagle", then published, and which is published now, at the city of Ponce, which numbers refer to the 13th, 20th, and 27th days of August and the 3rd day of September 1904. And that the sale was made for the sum of 37000 dollars (37000 dollars) principal of the mortgage which the purchaser bound himself to pay and 500 dollars in cash. The valuation of the said property "Semil" having been fixed, according to the deed of the constitution of the mortgage in the sum of forty thousand dollars ($40000), and that the purchaser paid the purchase price when the sale was made.

Sixth. We deny the correlative fact of the complaint, and in opposition thereto we allege that neither when the sale was made, nor at any time prior thereto, the property has not been worth more than forty thousand dollars, which was the valuation given to the same.

Seventh. We deny the correlative fact of the complaint, and state anew the foregoing allegation as far as the valuation of the property "Semil" is concerned.

Eighth. We admit the correlative fact of the complaint; but we allege that the marshal acted by virtue of an order of the court directing the sale of the property.

Ninth. We deny the correlative fact of the complaint and allege that the members of the partnership Lothrop Luce & Co., in whose favor the mortgage was constituted, are Mr. John D. H. Luce and Mr. Charles L. Crehore.

Tenth. We deny the correlative fact of the complaint.

Eleventh. We accept the correlative fact of the complaint.

Third defense. We allege as third defense:

First. That by a public deed executed on the 25th of
46 April, 1904, before Don Felipe Casalduc, a notary public, under No. 101, Don Marcelino Torres Zayas and his wife sold in favor of Don Alejandro Alvarado, the property "Semil", for the sum of $50000 to be paid on instalments, and that the said Mr. Alvarado, as such owner thereof, was notified of the judicial sale of said property "Semil" so that he should pay the purchase price for which the same was sold at auction, and liberate the same or to allow that the registration of his ownership be cancelled, if no reason should be shown by him why the same should not be done, and as a consequence of this notification, Mr. Alvarado appeared before this court and stated under oath that he had nothing to object against the cancellation of the registration of his ownership and that he could not pay the purchase price.

As 4th offense we allege: Res Adjudicata.

That Don Alejandro Alvarado, as owner of the plantation "Semil", by purchase from Don Marcelino Torres Zayas, brought a suit in this court against Mr. William Sturgis Hooper Lothrop while the foreclosure proceedings to collect the mortgage constituted

upon the property "Semil" was pending, whereby he brought the same actions brought in the complaint now answered by us, and that the said suit ended by a final judgment against the said Mr. Alvarado.

As fifth defense we allege: Statute of Limitations.

The actions for annulment are barred.

I. Because they can be brought only during the course of the foreclosure proceedings to collect the mortgage, and not after the same has ended.

II. In accordance with section 37 of the Mortgage Law and section 140 of the Code of Civil Procedure.

The actions for damages are barred:

In accordance with section 1869 of the Civil Code.

47 As 6th defense we allege:

That the mortgage constituted upon the property "Semil" for the sum of $37000, has not been paid, nor the interest thereon, either by Don Marcelino Torres Zayas, or his assignee Don Alejandro Alvarado; and that the same has been paid by Don Pedro Juan Rosaly to the holders and legitimate owners of the notes by which the said mortgage was represented; that is, Messrs. Lothrop Luce & Co., and has been cancelled by the latter; and that if the judicial sale and the registration thereof in the registry should simply be declared null and void without making any declaration with regard to the force and subsistence of the mortgage and to the obligation of the plaintiff to pay the same, the latter would be relieved from the payment of said mortgage without having paid the same.

By virtue of the foregoing, we pray the Hon. Court, to dismiss the complaint with regard to the first cause of action brought therein; and that in case the complaint should succeed, the court should hold that the mortgage for the amount of 37000 dollars and interest thereon at the rate of 10% is still in force upon the property "Semil".

As 7th defense, in so far as the first cause of action is concerned, and only in so far as such action may affect the right of Messrs. Lothrop Luce & Co. we allege:

That the mortgage constituted by Pedro J. Rosaly in favor of Lothrop Luce & Co., for the sum of 30000 dollars, on the 7th of October 1905, was to secure the payment of notes payable to order, and issued for the aforesaid amount, which notes are now in the hands of third persons, by virtue of the indorsements legally made thereon and for valuable consideration, which persons are the legitimate owners of the mortgage the annulment of which is sought.

48 With regard to the second cause of action, the defendant Pedro J. Rosaly alleges:

As First Defense: That the same does not state sufficient facts to constitute the causes of action brought therein against the said defendants.

As Second Defense: We deny all the facts thereof except in so far as the same have been admitted in the specific denial made in the foregoing cause of action.

As Third Defense: The statute of limitations, in accordance with section 1869 of the Civil Code.

Ponce, P. R., February 19th, 1908.

JOSÉ TOUS SOTO,
Counsel for the Defendants Now Appearing.

Service accepted on this 20th day of February, 1908.

BOERMAN AND LLORENS,
Counsel for Plaintiff.

Filed February 20th, 1908.

F. BARNÉS, *Secretary.*
By F. W. PRESTON,
Deputy Secretary.

49 *Opposition.*

In the District Court for the Judicial District of Ponce, P. R.

MARCELINO TORRES ZAYAS
vs.
LOTHROP, LUCE & Co. et al.

Annulment of Foreclosure, etc.

Opposition.

Now comes the plaintiff and opposes the Fifth Defense contained in the answer, in so far as the two subdivisions thereof regarding the action for annulment and the other subdivision thereof regarding the action for damages, are concerned, and alleges that none of the above actions is barred by the Statute of Limitations.

The plaintiff opposes also the Third Defense to the second cause of action, which is the Statute of Limitations.

BOERMAN & LLORENS,
Counsel for Plaintiff.

Service accepted on this 24th February, 1908.

JOSÉ TOUS SOTO,
By M. TOUS SOTO,
Counsel for the Defendants Who Have Appeared.

Filed February 24th, 1908.

F. BARNÉS, *Secretary,*
By F. W. PRESTON,
Deputy Secretary

50 *Demurrer to the Answer.*

In the District Court for the Judicial District of Ponce, P. R.

MARCELINO TORRES ZAYAS
vs.
LOTHROP, LUCE & Co. et al.

Annulment of Foreclosure, etc.

Demurrer to the Answer.

Now comes the plaintiff and demurs to that part of the answer filed by the defendants Lothrop Luce & Co. and Pedro Juan Rosaly, entitled Third Defense, as well as that part entitled Fourth Defense, and as ground of his demurrer alleges: That these parts or paragraphs of the answer do not state sufficient facts to constitute a defense to the complaint.

BOERMAN & LLORENS,
Counsel for Plaintiff.

Service accepted on this 24th day of February, 1908.

JOSÉ TOUS SOTO,
By M. TOUS SOTO,
Counsel for the Defendants Who Have Appeared.

Filed February 24th, 1908.

F. BARNÉS, *Secretary,*
By F. W. PRESTON,
Deputy Secretary

51 *Decision of the Demurrer to the Answer.*

MARCELINO TORRES ZAYAS
vs.
LOTHROP, LUCE & Co. et al.

Annulment of Foreclosure, etc.

Decision of the Demurrer to the Answer.

A demurrer has been filed to the first and fourth defenses of the answer, on the ground that such defenses do not state sufficient facts to constitute a defense to the complaint. The third defense alleges that plaintiff herein has nothing to do with this cause of action, if any there be; and that he is not at all interested in the ownership of the property "Semil".

The above defense seems to be sufficient.

The fourth defense alleges that Don Alejandro Alvarado, who purchased the property "Semil", before the institution of the fore-

closure proceeding, brought a suit against the assignor of the defendants herein, whereby he brought the same actions brought in the complaint filed in the case at bar; and that the said suit ended by a final judgment rendered against Mr. Alvarado. It appears that there are in his defense, identity of parties, identity of the character of the parties and identity of the subject matter. It does not appear whether there is identity of causes of actions, because this court is still in doubt with regard to the kind of action brought in the complaint filed herein. The demurrer is dismissed with costs to the plaintiff.

Ponce, P. R., April 6th, 1908.

MARTIN E. GILL,
District Judge.

52 *Default of the Defendant Alice Lothrop.*

MARCELINO TORRES ZAYAS
vs.
LOTHROP, LUCE & Co. et al.

Annulment of Foreclosure, etc.

Motion.

Before the Hon. the Judge of the Court.

Now comes the plaintiff in the above entitled case, by his undersigned counsel, and shows:

That as shown by the affidavit filed herewith, the defendant Doña Alice Lothrop is absent from this island, her residence at the present time being unknown.

It does not appear from the said affidavit, that Da. Alice Lothrop is the universal heiress of Mr. William Sturgis Hooper Lothrop; that the latter died in this city; and that the said defendant is a necessary and proper party to this suit, and that there is against her a good cause of action as the same has been brought.

Whereupon, we pray the court to make an order directing that the citation of the said defendant be made by publication of the summons, in the newspaper the "Porto Rico Eagle" which is published in this city, and directing further that the notices be published once every week during the course of one month, under the provisions of sections 94 and 95 of the Code of Civil Procedure now in force; and to direct also, that a copy of the summons be sent by mail to the aforesaid defendants.

Respectfully,

BOERMAN & LLORENS,
Counsel for Plaintiff.

Filed December 20th, 1907.

F. BARNÉS, *Secretary.*

53 MARCELINO TORRES ZAYAS
vs.
LOTHROP, LUCE & CO. et al.

Annulment of Foreclosure, etc.

Affidavit.

I, Marcelino Torres Zayas, being sworn, say that I am the plaintiff in the above entitled case; that on the said 26th day of February, 1901, the affiant, being then married and owner of the property "Semil" of 535 cuerdas, constituted thereon a mortgage in favor of Mr. William Sturgis Hooper Lothrop, for the sum of 370000 thousand dollars.

That on the 3rd day of May 1904, the said mortgage had not become due and the affiant owed nothing to his creditor Lothrop as interest thereon. That on the aforesaid day the said Mr. Lothrop filed a complaint against the affiant, instituting thereby a foreclosure proceeding to collect four thousand six hundred dollars as interest due. That it was maliciously stated in the aforesaid complaint that the affiant was owing such interest, which was not true. That the mortgage constituted on the aforesaid property and some others, was so constituted to secure the payment of eight notes issued for the amount of five thousand seven hundred and fifty dollars each; and that according to my information and belief Mr. Lothrop transmitted the said notes to third persons, before the 26th day of February 1904, and that the said notes were also in the hands of third persons on the 3rd day of May, 1904. That the said notes were not filed in the court with the said complaint, nor were they produced during the course of the whole foreclosure proceedings.

That on the 3rd day of May, 1904, the District Court of
54 Ponce, by virtue of the foreclosure proceeding brought by Mr. Lothrop, issued a writ against Mr. Torres Zayas, who was the only defendant in said proceeding, the mandatory precept of which literally reads:

"It is directed that Don Marcelino Torres Zayas, a resident of Juana Díaz, or any other person who may be legally in charge of the property mortgaged, be required to make payment to the creditor, the plaintiff Mr. William Sturgis Hooper Lothrop, or to his legal representatives in this city, within thirty days, of the sum of four thousand six hundred dollars, which he is owing the latter as interest due up to the 21st of February last, and of those which, at the legal rate, may become due on said amount up to the moment of making the payment, and to pay the costs, and to warn him that in case he fails to do so the property mortgaged will be sold at auction to secure the payment of said liabilities. And for the proper return of this writ, an order shall be issued to the Municipal Court of Juana Díaz, in accordance with the further prayer of the petition. The presiding judge of this Court Don Isidoro Soto Xussa is appointed Examining Judge for this cause. It was agreed upon and

signed by the judges of this Court; and attested by me.—Isidoro Soto Nussa.—R. Sanchez Montalvo.—H. S. Belaval. Luis Gautier."

It was stated by the said court of Ponce, in said writ, that the same was issued upon consideration of the facts stated in the complaint filed by Mr. Lothrop, wherein the latter stated that he bound himself to pay whatever damages might accrue to the debtor, Torres Zayas, caused by any malice or negligence incurred in the faithful
55 statement of the facts contained in his complaint (Mr. Lothrop's); but he did not bind himself in the same manner with regard to the other circumstances which the court should have taken into consideration so as to authorize the proceeding and entertain the same. The aforesaid writ of the court of Ponce, of the third of May 1904, at which date the said court was composed of three judges, was subscribed only by two of the judges of the court. In pursuance of the aforesaid writ (of the third of May 1904), the marshal of the court of Ponce required Don Marcelino Torres Zayas to make payment in the form directed in said writ; but the co-owner of the land, Da. Mercedes Laborde, was not so required nor was she ever notified with regard to said proceeding. A copy of said complaint was not delivered, either, to Don Marcelino Torres, nor to any other person on his behalf; nor was the said Torres, or his wife, required to pay any amount whatsoever after the auction sale had taken place, nor was any order or summons of the court served on them during the whole course of said proceeding, with the single exception of the writ issued when the proceeding was initiated, which was served on Mr. Torres, as stated in the foregoing allegations.

After the thirty days given to Mr. Torres Zayas, to make the payment, had elapsed, the court of Ponce on motion of Mr. Lothrop's counsel, made an order directing the property mortgaged to be sold at public auction for failure of Mr. Torres Zayas to make the payment of the sum claimed by his creditor (then plaintiff Mr. Lothrop), within the thirty days given him for such purpose. But this order of the court of Ponce, which appears to have been made on the 16th of June of the said year, 1904, was authorized and subscribed only by two of the judges of said court, which, at
56 that time, was composed of three judges.

That on the 19th of July, 1904, the District Court of Ponce made an order directing that execution should be issued in pursuance of the writ of the third of May, 1904. And although this writ did not provide for the attachment of the property, nor the sale thereof at public auction (as it only required the debtor to make payment), nevertheless the marshal of the said court of Ponce, without proper order therefor, attached the properties mortgaged, of Mr. Torres Zayas, on the 30th of July, 1904, without appearing on the place where they are situated, and then proceeded to sell them at public auction.

In pursuance of the said auction, notics were published in the local paper "The Porto Rico Eagle." A notice was published for the first time on the 24th of August, 1904; the second time, on the 31st of the same month and year; the third time, on the seventh

day of September, of said year; and the fourth, and last time, on the fourteenth of September, of said year 1904. The auction sale took place on the 12th of September, 1904, that is to say, two days prior to the publication of the last notice. Therefore the notices were published only during the term of twenty days, and the sale took place eighteen days after the publication of the first notice.

The valuation given to the property in said mortgage was not stated in said notices, so that said valuation should be taken as basis for the sale. Nor was said valuation taken into consideration for the purpose of the same, nor were the bidders required to pay 10% of said valuation so that the property was sold at first auction without subjection to any rate of valuation.

That on the same day, the twelfth of September, 1904,
57 the Secretary of the court, after the auction sale had taken place, accepted the offer of the defendant herein Don Pedro Juan Rosaly, for the amount of Five Hundred Dollars, plus the costs of the proceeding and his obligation to pay the mortgage then constituted upon the property, and said secretary issued a certificate in his favor as title for the Registry of Property; that the return of the marshal shows that the sale was made without subjection to any rate of valuation and that it was made on the 18th day after the publication of the first notice, all of which is contrary to law.

That afterwards, and without any order of the court of Ponce, the marshal thereof, on the 7th of October, 1905, executed a deed of the property mortgaged and sold, in favor of the defendant Don Pedro Juan Rosaly y Capó, before Don J. Fernandez Coronas, a notary public of Ponce; and on the same day and before the same notary, the defendant Mr. Rosaly Capó constituted a mortgage upon the said property for the sum of Thirty Thousand Dollars in favor of the mercantile partnership of this city "Lothrop Luce and Co.," who are also defendants in this suit. And the aforesaid deeds have been recorded in the Registry of Property of Ponce.

That the plaintiff Marcelino Torres was on the 26th of February, 1901, and still is, the owner of the property "Semil," which belongs to him as matter of right, although the same appears to be recorded in favor of Don Pedro Juan Rosaly, and is in the possession of the defendants.

That Mr. William Sturgis Hooper Lothrop died in the year 1906, his sole heiress being his widow, the defendant Alice Lothrop.

That Mr. Lothrop appropriated to himself the crop of one
58 thousand quintals of coffee, produced by the property "Semil," during the months of November and December 1904, and January and February, 1905, the net and liquidated proceeds of which crop, according to my information and belief amounted to eight thousand dollars. That according to my information and belief Don Pedro Juan Rosaly, as agent of Mr. Lothrop, appropriated to himself and sold the crop of coffee produced during the months of November and December, 1905, and January and February, 1906, the net proceeds of which, according to my information and belief, amounted to ten thousand dollars. And he also apropriated to himself the sum of twelve thousand dollars, which was the net amount

of the proceeds during November and December, 1906, and January and February, 1907, according to my information and belief.

That according to my information and belief, the defendant Mr. Rosaly as well as all the members of the mercantile partnership Lothrop Luce & Co. had personal knowledge of the defects and of nullity the foreclosure proceeding referred to; that according to my information and belief, although Mr. Rosaly appeared as purchaser of the property "Semil", and had recorded the same in his own name, actually he is nothing more than a trustee for the plaintiff Mr. William Sturgis Lothrop, and the property actually belongs now to the heiress or widow of William Sturgis Lothrop and not to Mr. Rosaly, and that according to my information and belief, Lothrop Luce & Co., who appeared as mortgage creditors with regard to this property are nothing else than trustees who hold the aforesaid mortgage in trust for the heiress of William Sturgis Lothrop.

That the defendant Da. Alice Lothrop is absent from Porto Rico, and according to my information and belief her residence is at Beacon street, in the city of Boston, State of Massachusetts.

59 That plaintiff has taken steps to ascertain her whereabouts and has received the information stated which he believes to be true. That the marshal of this court returned the summons issued for the citation of the said defendant stating that she could not be summoned on account of being absent. That the plaintiff has taken all possible steps with proper diligence and ascertained that the defendant Da. Alice Lothrop is not found in the island of Porto Rico.

That on account of the foregoing facts, affiant and his wife have had mental suffering and have been materially damaged having been deprived of their property and bound to live with very scarce means, their credit being lost, and they being compelled to apply themselves to hard work to support their families, which damages they estimate in the sum of twenty thousand dollars. And that, therefore, we have a good cause of action in this suit against the defendant Alice Lothrop and further defendants, and that the said Alice Lothrop is a necessary or proper party thereto.

And that all the foregoing facts are true and constitute matters of my own personal knowledge, except those stated according to information and belief, which I believe to be true.

Wherefore the court is hereby prayed to issue an order directing that the citation of Da. Alice Lothrop be made by publication of the summons, designating the paper wherein the same shall be published, for the period of one month, once a week, and directing further that a copy of said summons and of the complaint be sent by mail to the aforesaid lady, addressed to the place of her residence, at Beacon st., Boston, Massachusetts.

MARCELINO TORRES.

60 Sworn to and subscribed before me, by Marcelino Torres Zayaz, personally known to me, on this 19th day of December, 1907.

CARLOS F. CHARDON,
Notary Public.

Filed on 20th December, 1907.

F. BARNÉS,
Secretary.

61 In the District Court for the Judicial District of Ponce, P. R.

MARCELINO TORRES ZAYAS
vs.
LOTHROP, LUCE & Co., et al.

Annulment of Foreclosure, etc.

Order.

And affidavit having been filed by the plaintiff herein, Marcelino Torres Zayas, from which it appears that Da. Alice Lothrop one of the defendants, is not found within the island of Porto Rico, and that her residence is in the State of Massachsuetts; that there is a good cause of action against the said defendant and that she is a necessary party to this suit; that the marshal of this court returned the summons issued for the citation of the said defendant, the heiress of William Sturgis Hooper Lothrop, the said marshal being unable to make proper service of said summons because the said defendant was absent; and that her residence is at Beacon Street, in the city of Boston, State of Massachusetts, it is hereby ordered by this Court, that the citation of the said defendant Doña Alice Lothrop, be made by publication of the summons in the newspaper called "The Porto Rico Eagle", published in the city of Ponce, the said publication to be made once a week and for the period of one month; and it is further ordered that a copy of said summons as well as of the complaint be sent by mail to said lady addressed to the place of her residence, at Beacon Street, Boston Mass.

Ponce, P. R. January 9th, 1908.

MARTIN E. GILL, *Judge.*

62 In the District Court for the Judicial District of Ponce, P. R.

MARCELINO TORRES ZAYAS
vs.
LOTHROP, LUCE & Co.

Annulment of Foreclosure, etc.

Affidavit of Publication.

The undersigned, being under oath, solemnly deposes and says: that he is the Editor of the paper the Porto Rico Eagle, which is published daily at the city of Ponce and which has a general circulation throughout the island of Porto Rico. That the summons at-

tached to this affidavit have been published in full in said paper, on the following dates: the 13th, the 20th and 27th days of January, on the 3rd, the 10th and 17th and 19th days of February, of the year 1908.

R. SANTONI.

Sworn to before me on this 28th day of February, 1908.

M. ALBERTO SALICRUP,
Notary Public.

There is a seal fixed thereon which reads: M. Alberto Salicrup, Notary Public, Ponce, P. R.

Filed on this 3rd March, 1908.

F. BARNÉS, *Secretary.*

63 In the District Court for the Judicial District of Ponce, P. R.

MARCELINO TORRES ZAYAS
vs.
ALICE LOTHROP et al.

Affidavit.

I, Alejandro Cabassa, being sworn, say: that on the 18th of February, 1908, I sent by registered mail a copy of the summons and of the complaint hereto attached, under an envelop addressed to Da. Alice Lothrop, Beacon Street, Boston, Mass.

ALJ. CABASSA.

Sworn to before me on this 28th day of February, 1908.

TOMÁS CASTILLO,
Notary Public.

There is a seal fixed thereon which reads: Tomás Castillo León. Attorney-at-law.—Notary.—Ponce, P. R.

Filed on this 3rd March, 1908.

F. BARNÉS, *Secretary.*

The complaint referred to in the foregoing affidavit is that which has been transcribed herein at the commencement of this transcript of record; and the summons referred to in the aforesaid affidavit and in the affidavit of publication formerly transcribed, literally copied reads as follows:

Notice.

UNITED STATES OF AMERICA,
The President of the United States, ss:

In the District Court for the Judicial District of Ponce, P. R.

64 MARCELINO TORRES ZAYAS and MERCEDES LABORDE Y PEREZ,
Plaintiff-,
vs.
ALICE LOTHROP, LOTHROP, LUCE & CO., PEDRO JUAN ROSALY Y CAPÓ, and ENRIQUETA CABRERA Y PAZ, Defendants.

Summons.

The People of Porto Rico to Da. Alice Lothrop, One of the Defendant- Abovementioned:

You are hereby notified: that in the office of the Secretary of the District Court for the Judicial District of Ponce, P. R., a complaint has been filed by the plaintiff abovementioned, by their counsel Boerman and Llorens, wherein they pray this Court to render judgment in this suit declaring the law and the facts to be in favor of the plaintiffs and against you and the other defendants therein, and also holding as follows:

1st. Holding that Don Marcelino Torres Zayas was not bound to pay on the 3rd of May, 1904, four thousand six hundred dollars as interest due on the 26th of February of the said year 1904, by reason of the mortgage constituted on the 26th of February, 1901, before the notary public of the city of Ponce, Don Rosendo Matienzo Cintrón, by the aforesaid Mr. Torres Zayas in favor of your husband Mr. William Sturgis Hooper Lothrop, for the sum of forty six thousand dollars, which mortgage credit has been recorded in the registry of Property of Ponce, on folio 245 of Book 30th of Juana Díaz, property No. 1538, registration 8th; and that notwithstanding the said Mr. Torres Zayas on the third day of May 1904, had paid to his creditor Mr. William Sturgis Hooper Lothrop, the aforesaid four thousand six hundred dollars; and that therefore; the said Mr. Lothrop
65 lacked any right whatsoever to institute on the third day of May, 1904, the foreclosure proceeding which he instituted on said date and carried on, as referred to in the complaint; and that there was malice and negligence in the statement of facts made in the aforesaid complaint instituting the foreclosure proceedings, and filed in this court by Mr. Lothrop against Mr. Torres Zayas on the said day, the 3rd of May, 1904.

II. Holding that all orders made by the court, all writs issued by the secretary, and all services and returns made by the marshel and sheriff of the District Court for the Judicial District of Ponce, during the course of the foreclosure proceeding brought by Mr. William Sturgis Hooper Lothrop against Don Marcelino Torres Zayas, which was instituted with the filing of the complaint on the third of May,

1904, which proceedings and complaint have been referred to in the allegations made in the said complaint, are null and void and without any effect whatsoever.

III. Holding that the whole of the said foreclosure proce-ding is null and void from the beginning up to the termination thereof.

IV. Holding that the certificate issued by the marshal of the court of Ponce in favor of Don Pedro Juan Rosaly, on the 12th day of September, 1904, when the option sale of the property "Semil" took place, whereby the said property was adjudicated to him by the acceptance of the offer made by him in said sale, is null and void, and holding, further, that such sale is null and void.

V. Holding that the deed of judicial sale executed by the marshal of the Court of Ponce in favor of Don Pedro Juan Rosaly, on the 7th of October, 1905, before J. Fernandez Corona, a notary public of Ponce, and the registration of said deed in the Registry of
66 Property of Ponce, are null and void.

VI. Holding that the mortgage constituted by Don Pedro Juan Rosaly, on the 7th of October, 1905, upon the same property "Semil," in favor of Lothrop Luce & Co., before Fernandez Corona, a Notary Public, and the registration thereof in the Registry of Property of Ponce, are null and void.

VII. Holding that the said property "Semil" belongs to the plaintiffs in this suit Marcelino Torres Zaya, and Mercedes Laborde y Perez who are the legitimate owners thereof; and directing them to be put in possession of the said property, which description is as follows: "A coffee plantation named "El Semil," situated in the ward of Villalba-arriba, in the municipal jurisdiction of Juan Díaz, covering an area of five hundred and thirty five cuerdas and sixteen hundredth equivalent to two hundred and ten hectares, fifty three ares and ninety two centiares, with the following establishments: a wooden dwelling house, with zinc; another of the same construction for a store; a wooden ware-house covered with zinc for the storage of fruits with special arrangements for the drying thereof on the ground floor; a hulling machine for coffee; a shed for laborers and twelve small wooden houses covered with zinc, for the dwelling of the laborers' families. The said property is bounded on the North by a public road and by lands belonging to Juan Felix Baez, Socorro García, and to the Succession of Don Severo Segarra; on the East, by lands belonging to Don Domingo Olivieri, to the succession of Catalina Matos, to Lucas Negrón, Julian Negrón, to Don Domingo Olivieri, to the succession of Juan Angel Rosario, to Tomás Negrón and to José Torres; on the South, by lands belonging to Don José Genaro Rivera, Don José del Carmen, Da. Dominga Negrón, Don Marcial Serrallés, Eduvigis Rodriguez, Ramón Sanchez, Pedro Morales, and Don Antonio Santí; and on the West, by a public
67 road and lands belonging to Don Juan Zaragoza, Don José del Carmen Negrón and the succession of Don Severo Segarra.

VIII. That in case the court should not consider it to be just to decree that the said property "Semil" be returned to the plaintiffs, the court is prayed to adjudge and decree that the defendants, or such

defendants as the court should deem liable on account of the facts stated in the complaint pay to the plaintiffs the proper value of the aforesaid property, which is not less than eighty thousand dollars.

IX. To adjudge that Da. Alice Lothrop as heiress of W. S. H. Lothrop pay over to the plaintiffs eight thousand dollars, amount of the proceeds of the coffee crops of the aforesaid property, during the months of November and December, 1904, and January and February, 1905, and the twenty two thousand dollars, amount of the proceeds of said property during the months of November and December, 1905, January and February, 1906, November and December, 1906, and January and February, 1907.

X. That in case the court should consider it more proper, in furtherance of justice, to adjudge that Don Pedro Juan Rosaly y Capó, instead of Da. Alice Lothrop, pay over to the plaintiff the twenty two thousand dollars amount of the produce of the property "Semil," during the months of November and December, 1905, January and February, 1906, November and December, 1906, and January and February, 1907.

XI. To adjudge that Da. Alice Lothrop as sole heiress of W. S. H. Lothrop, indemnify the plaintiff — the sum of twenty thousand dollars, as damages for the moral sufferings and material loss sustained by them on account of the facts stated in the complaint.

XII. And adjudging Da. Enriqueta Cabrera y Paz to consent to the declaration of nullity of the foreclosure proceeding and of the deeds and registration thereof, referred to in the complaint,
68 and to give also her consent to the sale of the real properties acquired by her husband during the existence of the conjugal partnership, in so far as the same might be necessary to be sold to cover the amounts claimed from her said husband by virtue of this suit; and to impose the costs upon the defendants in this suit.

And you are hereby notified, that in case you fail to appear and answer this complaint within forty days after service, to be counted from the last publication of the summons, the plaintiff- may obtain that your default, as defendant, be entered, and through due process of law and proper proofs of the allegations contained in their complaint, they may further obtain judgment against you, as prayed for.

Given under my hand, and under the seal of this court, at Ponce, P. R. this tenth day of August, 1907.

(Signed) FRANCISCO BARNÉS,
Secretary of the Said Court.

There is affixed hereon the seal of said court of Ponce.

The foregoing is a true and faithful copy of the summons issued for your citation as defendant. And it is further stated that the plaintiffs by a motion filed together with an affidavit obtain an order from the court directing your citation by publication of the summons.

And for the publication thereof, once a week, during thirty days, in the paper "The Porto Rico Eagle" of Ponce, P. R., and in

pursuance of the aforesaid order of this District Court of Ponce, the present notice is hereby issued under my hand and the seal of this District Court of Ponce, at Ponce, P. R. January 9th, 1908.

F. BARNÉS,
Secretary of the District Court for the Judicial District of Ponce, P. R.

Filed on this 3rd March, 1908.

F. BARNÉS *Secretary.*

69 In the District Court for the Judicial District of Ponce, P. R.

MARCELINO TORRES
vs.
LOTHROP, LUCE & Co. et al.

Petition for Default.

The Secretary of the Court:

The term allowed the defendant Da. Alice Lothrop, in the summons, to file her answer to the complaint having elapsed, the plaintiff requests you to enter her default with regard to said complaint.

Respectfully,

BOERMAN & LLORENS,
Counsel for Plaintiff.

Filed April 3rd, 1908.

F. BARNÉS, *Secretary,*
By F. W. PRESTON,
Deputy Secretary.

70 In the District Court for the Judicial District of Ponce, P. R.

MARCELINO TORRES ZAYAS
vs.
LOTHROP, LUCE & Co. et al.

Annulment of Foreclosure, etc.

Motion for Judgment.

Before the Hon. the Judge of the Court.

Now comes the plaintiff and says:

That the defendant in this suit Da. Alice Lothrop was summoned by publication; that the time to file her answer has expired; that the evidence showing the publication of the notices appears in the record, from which it also appears that no answer or demurrer has been filed to the complaint. Wherefore, plaintiff Prays the Court,

to render judgment against Da. Alice Lothrop, in the manner provided for in paragraph 3 of section 194 of the Code of Civil Procedure now in force.

Respectfully,

BOERMAN AND LLORENS,
Counsel for Plaintiff.

Filed April 3rd, 1908.

F. BARNÉS, *Secretary,*
By F. W. PRESTON,
Deputy Secretary.

Entry of Default.

The defendant in this suit Alice Lothrop, having been duly summoned, and having failed to appear and answer the complaint, and the term of forty days given by law to said defendant to answer the complaint having expired, her default is hereby entered,
71 as prayed for on this day by the plaintiff through his counsel Don Luis Llorens Torres.

In witness whereof I hereunto affix my name and the seal of the court, at Ponce, P. R. April 3rd, 1908.

FRANCO. BARNÉS, *Secretary,*
By P. J. MASSANET,
Deputy Secretary.

72 In the District Court for the Judicial District of Ponce, P. R.

MARCELINO TORRES ZAYAS
vs.
ALICE LOTHROP et al.

Motion.

Now comes the plaintiff, by Boerman and Llorens his counsel, and moves this Hon. Court to direct the filing of the supplemental complaint with regard to facts occurred after the filing of the complaint in this suit.

BOERMAN & LLORENS,
Counsel for Plaintiff.

Service accepted on this 3rd. day of February, 1908.

JOSÉ TOUS SOTO,
Counsel for Defendants.

Filed this 3rd. March, 1908.

F. BARNÉS, *Secretary.*

73 In the District Court for the Judicial District of Ponce, P. R.

MARCELINO TORRES ZAYAS
vs.
ALICE LOTHROP et al.

Supplemental Complaint.

The plaintiff by this supplemental complaint alleges:

That after the filing of the complaint, the defendant Mr. Rosaly as attorney-in-fact of Mr. W. S. Lothrop and of his successor Da. Alice Lothrop, appropriated to himself the coffee-crop of the estate "Semil" described in the complaint, which crop amounted to nearly three thousand quintals of coffee, during the months of November and December 1907, and January and February 1908, the net and liquidated proceeds of which, after deducting the expenses, amounted to twenty thousand dollars.

Wherefore the plaintiff prays this Hon. Court to direct Da. Alice Lothrop, or Mr. Rosaly, if the court should consider it more proper in furtherance of justice to return also to the plaintiff the twenty thousand dollars which constitutes the net proceeds of the last crop.

BOERMAN AND LLORENS,
Counsel for Plaintiff.

Service accepted this 3rd. March 1908.
JOSÉ TOUS SOTO,
Counsel for the Defendants Who Have Appeared.

Filed on this 3rd March, 1908.
F. BARNÉS, *Secretary.*

74 In the District Court for the Judicial District of Ponce, P. R.

MARCELINO TORRES ZAYAS
vs.
ALICE LOTHROP et al.

Motion.

Now comes the plaintiff, by his counsel Boerman & Llorens, and moves this Hon. Court to make an order allowing the filing of the complaint presented with this motion.

BOERMAN & LLORENS,
Counsel for Plaintiff.

Service accepted on this 3rd. March, 1908.
JOSÉ TOUS SOTO,
Counsel for Defendants.

Filed on this 3rd. March, 1908.
F. BARNÉS, *Secretary.*

75 In the District Court for the Judicial District of Ponce, P. R.

MARCELINO TORRES ZAYAS
vs.
ALICE LOTHROP et al.

Amendment to the Complaint.

The plaintiff hereby amends his amended complaint as follows:
First. In the title thereof the following are to be added as defendants: Robert Roe, John Doe, Samuel Flin, James Gray, Charles Hamilton, John Smith and James Jones, which are all fictitious names substituted for the actual names which are unknown to the plaintiff.
Second. By adding to paragraph eighth of the fourth cause of action stated in the complaint, the following allegations:
"That the mortgage constituted by the defendant Mr. Rosaly y Capó in favor of Lothrop Luce & Co. was to secure the payment of certain notes alleged to have been issued which were fraudulently issued and without consideration, and that the said notes are now in the hands of different persons, the actual names of whom are not known to the plaintiff, for which reason the latter designates the same with the following fictitious names: Robert Roe, John Doe, Samuel Flin, James Gray, Charles Hamilton, John Smith, and Samuel Jones".
Third. By adding to paragraph sixth in the prayer of the first cause of action of the amended complaint, the following words: "and holding that the notes issued with the constitution of the mortgage in favor of Lothrop Luce & Co. are null and void."

BOERMAN & LLORENS,
Counsel for Plaintiff.

Service accepted on this 3rd. of March, 1908.

JOSÉ TOUS SOTO,
Counsel for the Defendants.

Filed on this 3rd. March, 1908.

F. BARNÉS, *Secretary.*

76 In the District Court for the Judicial District of Ponce, P. R.

MARCELINO TORRES ZAYAS
vs.
LOTHROP, LUCE & Co.

Motion to Amend the Complaint.

The answer filed in this suit alleges, as seventh defense, "that the mortgage constituted by Pedro J. Rosaly in favor of Lothrop Luce

& Co. for the sum of thirty thousand dollars, on the 7th of October, 1905, was to secure the payment of such certain notes payable to order, issued for the aforesaid amount, which are now in the possession of third persons, etc."

After the filing of the answer, a motion was made to amend the complaint, in such a manner as to allege: "that the mortgage constituted by Mr. Rosaly—defendant—in favor of Lothrop Luce & Co., was to secure the payment of certain notes alleged to have been issued, which have been fraudulently issued and without consideration."

The allegation of any complaint should be based on the knowledge of the plaintiff or on his information and belief (Sect. 118 of the Code of Civil Procedure). It is very doubtful that the plaintiff herein may have knowledge or information or belief of the truth of the allegation sought to be made.

Motion dismissed, with costs to the plaintiff.

Ponce, P. R., March 28th, 1908.

MARTIN E. GILL,
District Judge.

77 In the District Court for the Judicial District of Ponce, P. R.

MARCELINO TORRES ZAYAS
vs.
ALICE LOTHROP et al.

Answer to the Supplemental Complaint.

Now comes before the Hon. Court, Pedro J. Rosaly, defendant, by José Tous Soto, his counsel, and alleges:

That he denies the facts contained in said complaint.

Ponce, P. R., March 17th, 1908.

JOSÉ TOUS SOTO,
Counsel for Pedro J. Rosaly.

Service accepted on this 17th of March, 1908.

BOERMAN & LLORENS,
Counsel for Plaintiff.

Filed on this 17th of March, 1908.

F. BARNÉS, *Secretary,*
By F. W. PRESTON,
Deputy Secretary.

78 In the District Court for the Judicial District of Ponce, P. R.

MARCELINO TORRES ZAYAS
vs.
LOTHROP, LUCE & Co.

Motion to Amend the Complaint.

Before the Hon. the Judge of the Court.

Now comes the plaintiff and takes an exception from the order made by this Hon. Court on the 28th of March of the present year deciding the motion above stated, and prays the Court to consider the aforesaid order as having been excepted to for whatever effects may be proper.

Respectfully,

BOERMAN & LLORENS,
Counsel for Plaintiff.

Filed on this 3rd April, 1908.

F. BARNÉS, *Secretary,*
By F. W. PRESTON,
Deputy Secretary.

79 *Judgment.*

Case No. 140.

MARCELINO TORRES et al. (Counsel Llorens),
vs.
LOTHROP, LUCE & Co. et al (Counsel Tous Soto).

Annulment of Foreclosure and Other Petition.

At the city of Ponce, P. R. this 21st day of April, 1908; this case coming on to be heard on the 18th and 20th day of the present month, having been previously set for trial in the calendar, the plaintiffs Don Marcelino Torres Zayas and Da. Mercedes Laborde y Perez having appeared by their counsel Don Luis Llorens Torres, and the defendants Lothrop Luce & Co. Don Pedro Juan Rosaly, Da. Enriqueta Cabrera y Paz and the succession of William Sturgis Hooper Lothrop by their counsel Don José Tous Soto:—the opinion of the court is, after having heard the complaint and the answer thereto as well as the evidence introduced by both parties, that the law and the facts are in favor of the plaintiffs and against the defendants; that the filing of this complaint constitutes an attack upon the integrity and good standing of the defendants and of Mr. Lothrop, deceased; that such attack has fully failed; and that the complaint lacks absolutely any ground whatsoever under any regard or principle of law under which the same might be considered; and Therefore, the court should dismiss and does dismiss the complaint

with costs to the plaintiff. Judgment rendered at the city of Ponce, P. R. this twenty first day of April, 1908, and entered on the same day, month and year.—Attest.—F. Barnés, Sect. Dist. Court.—Approved—Martin E. Gill, Dist. Court, Judge."

80 In the District Court for the Judicial District of Ponce, P. R.

MARCELINO TORRES ZAYAS
vs.
LOTHROP, LUCE & CO., PEDRO JUAN ROSALY Y CAPÓ Y ALICE LOTHROP.

Action Involving: 1st, the Nullity of a Foreclosure Proceeding and Judicial Sale, as Well as That of a Mortgage and of Certain Registrations Made in the Registry of Property; 2nd, Claim of Certain Rents & Proceeds of Fruits, and 3rd Damages.

Notice of Appeal.

The Secretary of the Court:

You are hereby notified that an appeal is hereby taken by us to the Supreme Court of Porto Rico from the judgment rendered in this suit and entered on the 21st day of the present month of April, 1908.

Respectfully,

BOERMAN & LLORENS,
Counsel for Plaintiffs.

Service accepted on this 22nd day of April, 1908.

JOSÉ TOUS SOTO,
Counsel for Defendants.

Filed on this 22nd day of April, 1908.

F. BARNÉS, *Secretary,*
By F. W. PRESTON,
Deputy Secretary.

81 In the District Court for the Judicial District of Ponce, P. R.

MARCELINO TORRES ZAYAS
vs.
LUCE, CREHORE & Co. et al.

Bill of Exceptions.

Be it remembered, that at the trial of the above entitled case, held in the April term of this Court of the year 1908, the following exceptions were taken and entered on record on the part of the plaintiff, to wit:

No. 1. While the witness Pedro Juan Rosaly, an agent of the defendant, was being examined, by counsel for plaintiff, the latter offers evidence with regard to the delivery of certain coffee during the years 1901, 1902, 1903, which evidence, without objection from counsel for the defendants, is excluded by the court, and the plaintiff took an exception from this ruling of the court.

No. 2. The court excluded all evidence tending to establish the value of the crops produced by the property "Semil" during the years from 1903, up to the present date, and the plaintiff took an exception from this ruling of the court.

No. 3. The following appears from the testimony of Mr. Rosaly, while he was answering to questions put to him by counsel for the defendants:

C.: How does the endorsement made on said notes in favor of Buchanan read?

W.: For value received we hereby jointly and severally guarantee, in favor of J. A. Buchanan, the payment of the amount of this note, at the maturity thereof less our annual commission of
82 two per cent on the interest of said note, waiving all notifications and protests.

C.: Then, did Deford & Co. reserve the right to charge to Buchanan a commission on the amount of the interest of said notes?

W.: Yes sir.

C.: Had De Ford & Co. the right, in accordance with the aforesaid endorsement, to collect the interest on said note?

W.: Of course.

C.: Is the witness a merchant and has been so for a long time?

W.: Yes Sir.

C.: What is the meaning of an indorsement made in this form, under the practice in commerce?

The plaintiff objects to the foregoing question, which was admitted by the court, and from this ruling of the court the plaintiff took an exception.

W.: It means that De Ford & Co. remain as trustees of the thing in full, not only for the collection thereof but for any other steps that might be necessary to take even in the courts.

The plaintiff objects to the admission of the question, the court allows the same, and the plaintiff takes an exception from this ruling of the court.

C.: What is the meaning of a signature in blank like that affixed by Mr. Buchanan on this note?

The plaintiff objects to the foregoing question, and as the same was allowed by the court, the plaintiff took an exception.

W.: That the same has been returned by him, that the
83 same has been placed by him on the same condition that it had when De Ford & Co. held the same prior thereto.

C.: Did you answer to questions put to you by the adverse party that the stipulation in the mortgage deed with regard to the delivery

of coffee by Mr. Torres in payment of the interest was modified by a subsequent agreement?

The plaintiff objects to the foregoing question, and allowed by the court, the plaintiff took an exception.

W.: Yes Sir.

C.: How was that modification made?

Objection by the plaintiff and exception taken by him.

W.: It was favorable to Mr. Torres and I made the same in behalf of the firm.

C.: Are you an agent for the firm?

Objection and exception taken by the plaintiff.

W.: Yes Sir.

C.: Were they the same contracting parties who executed the deed?

Objection and exception taken by the plaintiff.

W.: Yes Sir.

C.: Was the modification made only with regard to the application that should be given to the coffee delivered?

Objection and exception taken by the plaintiff.

W.: Yes Sir.

C.: State the stipulations submitted by you to Mr. Torres.

Objection and exception taken by the plaintiff.

W.: According to the stipulations contained in the deed, Mr. Torres Zayes had no right to have funds advanced to him for
84 the expenses of the crop; about the middle of the year 1902, he told us that he had the property mortgaged; it was impossible to raise money to advance to him to cover said expenses and it was stipulated that money could be obtained by issuing notes signed by him, said money to be applied by him to the payment of said expenses and the money so advanced should be paid out of the funds with preference to anything else.

Objection and exception taken by the plaintiff.

No. 5. The defendants offered in evidence the books of accounts of De Ford & Co. and Lothrop Luce & Co.

The plaintiff objects because the same are not kept in the form provided by the Code of Commerce, inasmuch as the same is not a Ledger. Admitted by the court, the plaintiff took an exception. The books bear numbers from 16 to 20 inclusive.

No. 6. The defendants offer in evidence copying-books for letters Nos. 21, 22, 23, 24, 25, 26, 27. The plaintiff objects to the admission thereof and the same having been admitted by the court, the plaintiff took an exception.

No. 7. While the witness Marcelino Torres was testifying, the following questions were put to him:

C. The witness, please: Did you sell that property to any person before, or on, the institution of the foreclosure proceeding?

W. Yes Sir, I sold it to Don Alejandro Alvarado.

C. So, you sold it; please explain what kind of a business was transacted with Alvarado?

W. It was a simulated sale.

The defendant objects to allowing the witness to make explanations with regard to the business transacted with Alvarado in reference to the sale, because said sale, as well as the rescission thereof appear by a public deed introduced as evidence by the plain-
85 tiff himself, inasmuch as evidence tending to change the contents of a public instrument is not admissible and much the less to the prejudice of a third party.

The court sustains defendant's objection and the plaintiff took an exception from the ruling of the court.

C.: On what date did you leave said sale without effect?

W.: Two months afterwards, because Don Alejandro Alvarado's wife was opposed to his transacting the business.

On motion of counsel for defendant, the court ruled the above question and answer to be immaterial and the plaintiff took an exception.

No. 8. While the witness Alejandro Alvarado was testifying the following questions were put to him by the plaintiff.

C.: Was any deed of sale of the property "Semil" executed between Marcelino Torres and the witness?

W.: Yes Sir.

C.: And afterwards, was a deed of rescission executed?

W.: Yes Sir.

C.: Were the papers executed on the date stated in the deed?

W.: Yes Sir.

C.: Was the sale made by Mr. Torres, an actual sale?

Counsel for defendants objects to this question.

The court sustained the objection and the plaintiff takes an exception.

The following question was also put to the witness:

C.: Were such rights and actions as would enable him to demand the annulment of this foreclosure proceeding, ceded to Mr.
86 Torres?

The defendant objects to this question as being immaterial. The court sustained the objection and plaintiff takes an exception.

No. 8. Counsel for plaintiff offers in evidence the testimony of witnesses to prove the damages claimed and the amount of the crops. The court excludes such evidence and the plaintiff takes exception.

No. 9. The witness José Tous Soto, who is the attorney for the defendants, introduced by the latter, testifies as follows:

Q. What is your name?

A. José Tous Soto.

Q. Where do you live?
A. In Ponce.
Q. What is your profession?
A. Attorney-at-law.
Q. Are you the attorney for the defendants, or any of them in this suit?
A. Yes Sir, of Messrs. Lothrop, Luce & Co. and of Mr. Rosaly.
Q. Can the witness testify with regard to the complaint and the answer? Did you hold any official position on the 19th of July, 1904?
A. Yes Sir.
Q. What was that public office?
A. Judge of the District Court for the Judicial District of Ponce, P. R.
Q. Was a motion made to you, as Judge of the Court, by Mr. R. Ulpiano Colón * * * up to page 17 of the suit No. 99 brought by W. S. H. Lothrop against Marcelino Torres Zayas?

87 The plaintiff objects to the question, and the same having been allowed the plaintiff takes an exception.

A. Yes Sir.
Q. Was any order made in pursuance of said motion?

Objection and exception taken by the plaintiff.

A. Yes Sir.
Q. What was the order?

Objection and exception of the plaintiff.

A. Directing a writ of execution to be issued to the marshal to sell the properties at public auction.
Q. Have you found that order in the record of the case just referred to by you.
A. I did not find it.
Q. Did you find it in the judgment-book or in the minutes of the court?
A. I have not found it therein.
Q. In spite of that, are you sure that that order was made?

Objection and exception of the plaintiff.

A. Yes Sir, and as a consequence thereof the writ of execution was issued wherein reference is made to the said order made by the court.
Q. Was that order of the court made in pursuance of another order previously made by the District Court of Ponce?

Objection and exception of the plaintiff.

A. The order of May 3rd and June 16th of the same year the former directed that the defendants should be required to make payments, threatening him with the sale of his property in case he should fail so to do, and the second order directed the sale of the property at public auction.

88 The court directs an entry to be made in the record to the effect that no mention whatever of the said foreclosure proceeding is made either in the minutes of this court or in the judgment book thereof under date of July 19th, 1904; and that no page is missing in either of said books.

No. 10. The defendant puts the following questions to the witness Richard D. Coe:

C.: Does Mr. Coe know of any agreement made between Mr. Rosaly as agent for Messrs. De Ford & Co. and Mr. Torres Zayas, subsequently to the constitution of the mortgage on the property "Semil"?

Plaintiff objects to the question, and allowed by the court the plaintiff takes an exception.

W.: Yes Sir.

C.: Explain to the court what kind of an agreement that was.

Objection and exception of the plaintiff.

W.: It was agreed that De Ford & Company should advance money to Mr. Torres Zayas up to the sum of $5000 with the security of the crop, it being understood that the 5000 pesos should be paid out of the crop.

C.: Did Mr. Torres Zayas issue any notes for the said amount.

Objection and exception of the plaintiff.

W.: Yes Sir.

C.: Is that note among these?

Objection and exception of the plaintiff.

W.: These are the notes.

I, Martin Gill, Judge of the District Court of Ponce, hereby certify that the foregoing bill of exceptions contains a true copy of all the exceptions taken by the plaintiff during the trial held before me in the April term, in the year 1909.

(Signed) MARTIN E. GILL,
Judge of the Court.

89 The exception (allowed by law) from the judgment, where the same is not supported by the evidence, is based on the fact that the evidence introduced shows that the plaintiff proved to be true the facts stated in the complaint showing the irregularities of the foreclosure proceeding, the annulment of which is prayed for in the said complaint; that the plaintiff proved also that in February 1904, the said plaintiff had delivered to the defendant W. S. H. Lothrop the produce of the property "Semil" during that year, which greatly exceeded the sum of four thousand ($4600.00) six hundred dollars; and that the plaintiff proved also that when the said foreclosure proceeding was brought the 8 notes issued in regard to the aforesaid mortgage had already been endorsed and were in the hands of other persons residing in the United States, and that the said notes were not filed with the writing instituting the foreclosure proceeding nor at any stage during the course of said proceeding; and the evidence further shows that the plaintiff established all the allegations made in the complaint, except those regard-

ing damages and proceeds of the produce, the evidence offered in regard to this point having been excluded by the court.

90 In the Supreme Court of Porto Rico.

No. 337.

MARCELINO TORRES ZAYAS, Plaintiff and Appellant,
vs.
LOTHROP, LUCE & CO., PEDRO J. ROSALY Y CAPÓ and ALICE LOTHROP, Defendants and Respondents.

Appeal from the District Court of Ponce.

Opinion of the Court Delivered by Mr. Justice Wolf.

SAN JUAN, PORTO RICO, 18*th of March*, 1910.

Marcelino Torres Zayas and his wife Mercedes Laborde who were the owners of an estate called Semil, on the 26th of February, 1901, appeared before a notary and executed a mortgage on the same in favor of William S. H. Lothrop in the sum of $46,000, which was divided among eight notes signed by the said Torres Zayas to the order of the firm of De Ford & Co. of the city of Ponce. A part of the debt was secured by a mortgage on the estate Monserrate and the owners Collazo, Perez Guerra & Co. joined in the mortgage.

One of the agreements of the contract was that interest at the rate of 10% per annum should accrue on the 26th of February of each year until the principal became due, which would take place on the 26th of February, 1905. The mortgage was made to include the interest payments.

The ninth clause of the mortgage provided that the debtor Torres Zayas should annually deliver to De Ford & Co. the products of the tract Semil to permit said firm first to pay themselves the annual interest and then deliver whatever balance there was to Torres Zayas for the expenses and cultivation of the said lands.

91 It appears that the notes were made out to De Ford & Co. although the deed recites that they were payable to Lothrop; but this mistake and other minor ones were remedied by a suit brought at a later date against the debtor and others, in which it was adjudged that the notes described in the deed were the identical ones previously set forth in this opinion and that Lothrop was in reality the trustee for De Ford & Co. of which firm he was a member. Furthermore, although this discrepancy was made an assignment of error, in the appellants' brief, such error was not put in issue by the pleadings, nor was it raised in the court below and it cannot be raised for the first time in the appellate court.

It is conceded that the appellant paid the interest that accrued in 1902 and 1903, but the appellee maintained that the interest due on the 26th day of February, 1904, was not paid. The appellant asserts

the contrary and the principal contest in the case has been waged about this point.

By reason of this alleged default in the payment Mr. William S. H. Lothrop began in the District Court of Ponce a mortgage proceeding against the debtor Torres Zayas. This mortgage proceeding was commenced on the 25th of April, 1904, Mr. Lothrop having previously obtained the necessary certificate of the state of the Record from the Registry of Property and which certificate showed that the property was recorded in the name of Torres Zayas. On the 25th day of April, 1904, Mr. Torres Zayas by means of a public document conveyed the aforesaid property to Alejandro Alvarado, and the property was finally sold in the foreclosure proceeding to Pedro Juan Rosaly Capó in September, 1904. On the 29th of August, 1905, Fran-
92 cisco Parra representing Don Pedro J. Rosaly appeared before the District Court of Ponce in the same mortgage proceeding and set up that his client was unable to have the property recorded in the Registry because the same appeared to be recorded in the name of Alejandro Alvarado and not in the name of Torres Zayas, and, as this fact made it impossible for this client to obtain a title in due form of the property which he had acquired by virtue of the adjudication made by the marshal, he prayed the court to notify Don Alejandro Alvarado of the adjudication made to Don Pedro Juan Rosaly of the farm Semil in order that the former might pay the sum that was due thereon and the interest, and in the event of his not doing so within ten days that an order should be delivered to the Registry of Property in accordance with the Mortgage Law to cancel the record of ownership which said Alvarado had in his favor. Such an order was accordingly issued to Alvarado and on the 29th of September, 1905, the same Alvarado appeared in the District Court of Ponce and said in substance that at first he had by means of his lawyer, Mr. Llorens Torres, opposed the petition of Mr. Rosaly, but later abandoned his opposition without appearing in the court to make such opposition, and the said Alvarado goes on to say that, desiring to make known in the clearest manner his acquiescence in the petition of Mr. Rosaly, he appears and says "that not being able to pay to Mr. Rosaly the sum for which the plantation Semil was sold, the interest and costs, he joins in the petition made by Mr. Rosaly that the record of ownership which he, Alvarado, had on said property should be cancelled."

Between the time that Alvarado acquired the property from Torres Zayas and the time that he gave his consent to the record aforesaid, he had appeared in the District Court and brought a suit
93 against the present appellees, the grounds of which suit were substantially the same that were brought out in the complaint of Mr. Torres Zayas in this appeal. This suit of Alvarado was abandoned by him apparently without having served such appellees, defendants herein.

On the 20th of April, 1907, a rescission of the contract between Torres Zayas and Alvarado was executed.

The amended complaint in this case was filed on the 15th of January, 1908. In its essential aspects it is a suit for a nullity of all the

proceedings, which resulted in the sale to Mr. Rosaly of the farm Semil.

The defendants in this action are Lothrop, Luce & Co., Pedro Rosaly Capó and Alice Lothrop. Lothrop, Luce & Co. are the successors of De Ford & Co. and Alice Lothrop is the widow of W. S. H. Lothrop.

We have already considered one of the alleged grounds of nullity, namely, the facts that the notes were made payable to De Ford & Co. instead of being made payable to Lothrop.

The next ground of nullity was that the notes were not filed when the mortgage proceeding was begun and that such notes were endorsed to third persons. There does not appear to be anything in the Mortgage Law which requires the notes to be presented at the beginning of the mortgage proceeding. De Ford & Co. were acting as trustee for the holders of the notes and the said notes were returned to them. There was no danger of the defendants being sued by other persons because in the present suit the notes were delivered up cancelled. The endorsement made by De Ford & Co. to James H. Buchanan show moreover that the collection of the notes was left in the hands of De Ford & Co. It does not appear, further-
94 more, that the notes were not in the hands of De Ford & Co. when the proceeding was initiated.

Appellant next alleges that Torres Zayas was married and his wife was not made a party in the mortgage proceeding. Whilst a wife is a necessary party to a deed of land she is not a necessary party in a suit concerning the community property, the husband being the administrator thereof. See sections 161 and 1327 of the Civil Code, and the case of Porto Rican Leaf Tobacco Co. vs. Ereño et al., decided February 16th, 1910.

The fourth objection was that Torres Zayas was not served with a copy of the complaint. The proceeding had been begun before the Code of Civil Procedure went into effect, and there is nothing to show that the citation (requerimiento) was not in the due form required by the Mortgage Law.

The next objection is that there is no order or sentence of the court which authorizes the secretary of the District Court of Ponce to issue an order of execution to the marshal. At the trial of the case the writ issued to the marshal was offered in evidence and shows that there was such an order. Furthermore, on account of the death of the original attorney for the foreclosing parties, Mr. Colón, and of the Secretary of the District Court, the only other witnesses to the execution of the order, the judge in question, who is the attorney of the appellees in this case, took the stand and showed that such an order was issued. It was strenuously objected that this was parole evidence to vary the terms of a written record. It was however the best evidence in existence, and instead of changing the terms of the record, merely supplied something that was lacking.

95 It was then objected that the order of the 3rd of May, 1904, issuing the citation and the order of the 16th of June ordering the auction were incomplete, the first because it was signed by two regular judges and a lawyer by the name of Horacio S. Belaval who was not a judge; and the second because it was

signed by two judges only. The secretary certifies as to the first order that it was signed by the judges of the court (Señores del Tribunal), and this indicates that Belaval was a substitute judge in accordance with the general order of 1899 No. 118. In respect to the second order two judges can give validity to a writ or order and it is sufficient if such order is signed by the instructing judge.

It is then said that an error was originally made with regard to the publication, twenty days not being shown to have elapsed between the announcement of the auction and the public sale; but this error was corrected by a subsequent order of the Court; in other words, whilst the return of the marshal seemed to show that the proper time was not allowed the orders were in point of fact published in due time in the Porto Rico Eagle, and the mistake of the marshal in his return was corrected by the order of the court.

The next objection is that mortgage announcements or edicts did not announce that bids would not be received which did not cover two thirds of the value of the farm. In the original mortgage deed two pieces of property were mentioned, the firm of Collazo Perez Guerra & Co. mortgaging their property Monserrate in part to cover the money loaned to Torres Zayas. The plantation Semil was valued at $40000.00 and its mortgage responsibility fixed at $37-000.00. At the auction sale the property was sold to Mr. Rosaly for $500 and the assumption of the mortgage of $37000.00 and the payment of the receiver's balance. Therefore, as the prop-
96 erty was sold for more than two thirds of the mortgaged value, namely, the assumption of the mortgage of $37000.00 and the payment of $500 cash and said balance, the error, if any, did not prejudice the appellant.

These were substantially all the matters of mortgage procedure which the appellant alleged to be erroneous.

We come now to the consideration of the question of payment. The complainant Torres Zayas alleges in his complaint that he turned over all the products of the mortgaged estate, from the day on which the mortgage was constituted until the 3rd of May 1904, and that the products which were turned over by him to De Ford & Co. during all of that time were sold by them and that the money obtained from such sales exceeded greatly the amount of the interest which was due and payable on February 1904, and that in this manner the interest which was due on the 26th of February 1904 was paid. The defendants put in a general denial to the facts set out in that part of the complaint to which the foregoing allegations relate, admitting only the truth of the contents of the ninth clause in the mortgage. The appellees in their brief admit that all the sums which came from the sale of coffee, the product raised by Mr. Torres Zayas, entered into their hands, with the possible exception of a part of one sale, disposed of by the debtor himself. We have gone over the testimony with care and we do not find that there was any money which came into the hands of De Ford & Co. or their successors proceeding from Torres Zayas, for which no account was rendered. A great part of the time and specially during the period

between 1903 and 1904, De Ford & Co. rendered monthly accounts to Torres Zayas, who never challenged the correctness of their accounts until the complaint in this case was filed. It is true
97 that Alvarado made a similar suggestion in his complaint that more money had passed into the hands of Lothrop Luce & Co. than was necessary to pay the interest; but they abandoned the suit and the fact remains that the first attempt to show that there was more money in their hands was during the trial of the present suit which was several years later. We think the appellant delayed too long in objecting to the accounts of his bankers.

Mr. Rosaly was made a witness of the complainant in the court below and as such witness testified to the fact that the original contract of mortgage was modified by the agreement of the parties, and in part his testimony is corroborated by Mr. Coe, a witness for the defense.

Mr. Rosaly testified substantially that Mr. Torres Zayas needing money for the immediate expense of the cultivation of his property, asked that he should be allowed to draw upon the account which he had with them for the purpose of covering such expenses and this agreement was accordingly made. After the making of this agreement the appellant checked out against his account and the amount of the money that was so checked out did not leave sufficient amount in the hands of De Ford & Co. to pay the interest that fell due on the 26th of February 1904. Mr. Rosaly is contradicted by Mr. Torres Zayas in some respects, but he is not impugned in any way as a witness and as the court below found in favor of the appellees, this branch of the case must be governed by the familiar principle sustained by this court that where there is conflict in the evidence the finding of the lower court will not be disturbed in the absence of passion, partiality or prejudice. The acquiescence in the accounts rendered him was also evidence that the con-
98 tract between the parties had been changed. It is urged by the appellant that the debtors were bound to apply the payment first to the extinction of the mortgage and not to the satisfaction of the checks which were drawn against them; but whether the statements of the witnesses Rosaly and Coe, affirming the change in the contract, are considered along with the acquiescence of Mr. Torres Zayas, we do not think that the principle of section 1140 of the Civil Code is applicable. The original contract was changed by the declarations and acts of the parties.

We think moreover that the acts of Alvarado were a renunciation of any rights that the appellant might have had. The former appeared in court and solemnly announced his acquiescence in the petition of Mr. Rosaly. That petition as we have seen, recited that the citation of Alvarado was necessary to complete title in Mr. Rosaly. Alvarado was the record owner and the ostensible owner. He not only had a duly recorded public document in his favor, but he had begun a suit similar to the present one and this course of action was inconsistent with the possession by anyone else.

The appellant complains that the court erred in not permitting him to show that the conveyance made from Torres Zayas to Alva-

rado was fictitious or simulated and that the real party in interest was always Torres Zayas. We cannot see that the court committed an error in refusing to admit such testimony; at most Alvarado would have to be considered as the agent or representative of Torres Zayas and the maxim qui facit per alium facit per se may be held to apply. The registry system in Porto Rico exists to apprise purchasers and others who are the true owners of property, and if a man after treating with the apparent owner still have his title im-
99 pugned by a secret agreement existing between such record owner and the alleged true owner there would be no security in the acquisition of property.

Some other errors are alleged with respect to the refusal of the court to admit testimony of the value of the coffee turned over during the years 1902 and 1903 and also, of the value of the property turned over from 1903 up to 1908. The question of the amount of coffee that De Ford & Co. had in hand at the time of the mortgage proceeding was fully gone into at the trial, and the amounts received by them during that time accounted for in the manner which we have previously indicated. The object of this offer on the part of the complainant in the court below does not appear very clearly. Its object does not appear to have been to affect the question of payment, but some other purpose which is not made evident. It might have had some bearing if the question of damages was reached; but if such was its purpose, it was not made clear to the court and no prejudicial error could have arisen by reason of the fact that the principal cause of action having failed, the subsiduary ones alleged by the complainants would also have to fail.

The record in this case is prepared in a very clumsy manner. Documents are inserted at large when a mere reference to their contents would have been sufficient. The testimony is presented in the form of question and answer instead of in narrative form as indicated in the case of Lopez vs. Railroad Co., decided on the 28th day of June, 1906. We think that appellees could expedite the consideration of cases in this court by drawing the attention of the judges below to the way in which records are prepared and
100 suggesting amendments to conform to the principles of good practice we have enunciated.

We find no error in the judgment of the court below, and the judgment must be affirmed.

(Signed) ADOLPH G. WOLF,
Associate Justice.

101 In the Supreme Court of Porto Rico.

No. 337.

MARCELINO TORRES ZAYAS, Plaintiff and Appellant,
vs.
LOTHROP, LUCE & CO., PEDRO J. ROSALY CAPÓ, and ALICE LOTHROP, Defendants and Respondents.

Appeal from the District Court of Ponce.

Judgment.

SAN JUAN, PORTO RICO, 18*th March*, 1910.

This court has carefully examined the transcript of record filed herein pursuant to the appeal taken in the above entitled case and properly considered the arguments of counsel in support of their respective claims; and for the reasons stated in the Opinion filed herewith, the Court decides to affirm, as it does affirm, in all its parts, the judgment rendered in said case by the District Court for the Judicial District of Ponce which is the object of this appeal; and the court directs that a copy of this judgment be transmitted in proper form.

Thus we pronounce, command and sign.

JOSÉ C. HERNANDEZ.
JOSÉ MA. FIGUERAS.
JAMES H. MACLEARY.
ADOLPH G. WOLF.

102 In the Supreme Court of Porto Rico.

MARCELINO TORRES ZAYAS
vs.
LOTHROP, LUCE & CO., PEDRO J. ROSALY CAPÓ, and ALICE LOTHROP.

Action involving: 1st. The nullity of a foreclosure proceeding and judicial sale, as well as that of a mortgage and of certain registrations made in the registry of property; 2nd. Claim of certain rents and proceeds of fruits; and 3rd. Damages.

Motion.

Now comes Don Marcelino Torres Zayas, before this Hon. Court, by Charles M. Boerman, his counsel, and states: that feeling himself bound to appeal from the judgment rendered by the Supreme Court of Porto Rico in the above entitled suit, hereby prays this Hon. Court, in pursuance of the statute governing appeals from the

Supreme Court of the Territories of the United States and of Porto Rico, to make proper findings of fact for the purpose of said appeal.

C. M. BOERMAN,
Counsel for Appellants.

103 In the Supreme Court of Porto Rico.

MARCELINO TORRES ZAYAS
vs.
LOTHROP, LUCE & CO., PEDRO JUAN ROSALY CAPÓ, & ALICE LOTHROP.

Action involving: 1st. The nullity of a foreclosure proceeding and judicial sale, as well as that of a mortgage and of certain registrations made in the registry of property; 2nd. Claim of certain rents and proceeds of fruits; and 3rd. Damages.

Notice of Appeal.

Now comes Marcelino Torres Zayas by Charles M. Boerman, his counsel, and having filed an assignment of errors, which he deems to have been committed by this Hon. Supreme Court in rendering the judgment entered in this case, prays this Hon. Court to make an order allowing the appeal taken from the aforesaid judgment to the Supreme Court of the United States, and fixing the amount of the bond without supersedeas, which the appellant is required to furnish.

C. M. BOERMAN,
Counsel for Appellant.

104 In the Supreme Court of Porto Rico.

MARCELINO TORRES ZAYAS
vs.
LOTHROP, LUCE & CO., PEDRO JUAN ROSALY CAPÓ, & ALICE LOTHROP.

Action involving: 1st. The nullity of a foreclosure proceeding and judicial sale, as well as that of a mortgage and of certain registrations made in the registry of property; 2nd. Claim of certain rents and proceeds of fruits; and 3rd. Damages.

Assignment of Errors.

The appellant assigns the following errors which he deems to have been committed by the Supreme Court of Porto Rico in rendering judgment in favor of the defendants and appellees.

1. The Supreme Court erred in overruling the first exception of the bill of exceptions filed in this case, which first exception literally

read as follows: "While the witness Pedro Juan Rosaly, an agent of the defendant, was being examined by counsel for plaintiff, the latter offers evidence with regard to the delivery of certain coffee during the years 1901, 1902, 1903, which evidence, without objection from counsel of the defendants, is excluded by the court, and the plaintiff took an exception from this ruling of the court.

2. The Supreme Court erred in overruling the 2nd exception of the Bill of Exceptions, which literally reads as follows: "The court excluded all evidence tending to establish the value of the crops produced by the property "Semil" during the years from 1903, up to the present date, and the plaintiff took an exception from this ruling of the court.

3. The Supreme Court erred in overruling the 3rd exception thereof, which literally reads as follows: "The following ap-
105 pears from the testimony of Mr. Rosaly, while he was answering to questions put to him by counsel for the defendants.

"C. How does the endorsement made on said notes in favor of Buchanan read?

W. For value received we hereby jointly and severally guarantee, in favor of J. A. Buchanan, the payment of the amount of this note at the maturity thereof less our annual commission of two per cent on the interest of said note, waiving all notifications and protests.

C. Then, did De Ford & Co. reserve the right to charge to Buchanan a commission on the amount of the interest of said notes?

W. Yes Sir.

C. Had De Ford & Co. the right, in accordance with the aforesaid endorsement to collect the interest on said note?

W. Of course.

C. Is the witness a merchant and has been so for a long time?

W. Yes Sir.

C. What is the meaning of an indorsement made in this form, under the practice in commerce?

The plaintiff objects to the foregoing question, which was admitted by the court, and from this ruling of the court the plaintiff took an exception.

W. It means that De Ford & Co. remain as trustees of the thing in full, not only for the collection thereof but for any other steps that might be necessary to take even in the courts.

The plaintiff objects to the admission of the question, the court allows the same, and the plaintiff takes an exception from this ruling of the court.

106 C.: What is the meaning of a signature in blank like that affixed by Mr. Buchanan on this note?

The plaintiff objects to the foregoing question, and as the same was allowed by the court, the plaintiff took an exception.

W.: That the same has been returned by him, that the same has been placed by him on the same condition that it had when De Ford & Co. held the same prior thereto.

C.: Did you answer to questions put to you by the adverse party that the stipulation in the mortgage deed with regard to the de-

livery of coffee by Mr. Torres in payment of the interest was modified by a subsequent agreement?

The plaintiff objects to the foregoing question, and allowed by the court the plaintiff took an exception.

W.: Yes Sir.

C.: How was that modification made?

Objection by the plaintiff and exception taken by him.

W.: It was favorable to Mr. Torres and I made the same in behalf of the firm.

C.: Are you an agent for the firm?

Objection and exception taken by the plaintiff.

W.: Yes Sir.

C.: Were they the same contradicting parties who executed the deed?

Objection and exception taken by the plaintiff.

W.: Yes Sir.

C.: Was the modification made only with regard to the application that should be given to the coffee delivered?

Objection and exception taken by the plaintiff.

W.: Yes Sir.

107 C.: State the stipulations submitted by you to Mr. Torres.

Objection and exception taken by the plaintiff.

W.: According to the stipulations contained in the deed, Mr. Torres Zayas had no right to have funds advanced to him for the expenses of the crop; about the middle of the year 1902, he told us that he had the property mortgaged; it was impossible to raise money to advance to him to cover said expenses and it was stipulated that money could be obtained by issuing notes signed by him, said money to be applied by him to the payment of said expenses and the money so advanced should be paid out of the funds with preference to anything else.

Objection and exception taken by the plaintiff.

4. The Supreme Court erred in overruling the 5th exception thereof, which literally reads as follows: "The defendants offered in evidence the books of accounts of De Ford & Co. and Lothrop Luce & Co.

The plaintiff objects because the same are not kept in the form provided by the Code of Commerce, inasmuch as the same is not a Ledger. Admitted by the court, the plaintiff took an exception. The books bear numbers from 16 to 20 inclusive.

5. The Supreme Court erred in overruling the 6th exception thereof, which literally reads as follows: "The defendants offer in evidence copying-books for letters Nos. 21, 22, 23, 24, 25, 26, 27. The plaintiff objects to the admission thereof and the same having been admitted by the court, the plaintiff took an exception.

6. The Supreme Court erred in overruling the exception 7th thereof which literally reads as follows: "While the witness Marcelino Torres was testifying, the following questions were put to him:

108 C.: The witness, please: Did you sell that property to any person before, or on, the institution of the foreclosure proceeding?

W.: Yes Sir, I sold it to Don Alejandro Alvarado.

C.: So, you sold it; please explain what kind of a business was transacted with Alvarado?

W.: It was a simulated sale.

The defendant objects to allowing the witness to make explanations with regard to the business transacted with Alvarado in reference to the sale, because said sale, as well as the rescission thereof appear by a public deed introduced as evidence by the plaintiff himself in as much as evidence tending to change the contents of a public instrument is not admissible and much the less to the prejudice of a third party.

The court sustains defendant's objection and the plaintiff took an exception from the ruling of the court.

C. On what date did you leave said sale without effect?

W. Two months afterwards, because Don Alejandro Alvarado's wife was opposed to his transacting the business.

On motion of counsel for defendant, the court ruled the above question and answer to be immaterial, and the plaintiff took an exception.

7. The Supreme Court erred in overruling the 8th exception thereof which literally reads as follows: "While the witness Alejandro Alvarado was testifying the following questions were put to him by the plaintiff.

C. Was any deed of sale of the property "Semil" executed between Marcelino Torres and the witness?

W. Yes, sir.

C. And afterwards, was a deed of rescission executed?

W. Yes, sir.

C. Were the papers executed on the date stated in the deed?

W. Yes, sir.

109 C. Was the sale made by Mr. Torres, an actual sale?

Counsel for the defendants objects to this question.

The court sustained the objection and the plaintiff takes an exception.

The following question was also put to the witness:

C. Were such rights and actions as would enable him to demand the annulment of this foreclosure proceeding, ceded to Mr. Torres?

The defendant objects to this question as being immaterial. The court sustained the objection and plaintiff takes exception.

Counsel for plaintiff offers in evidence the testimony of witnesses

to prove the damages claimed and the amount of the crops. The court excludes such evidence and the plaintiff takes exception.

8. The Supreme Court erred in overruling the 9th exception thereof which literally reads as follows: "The witness José Tous Soto, who is the attorney for the defendants, introduced by the latter, testifies as follows:

Q. What is your name?
A. José Tous Soto.
Q. Where do you live?
A. In Ponce.
Q. What is your profession?
A. Attorney-at-law.
Q. Are you the attorney for the defendants, or any of them in this suit?
A. Yes, sir, of Messrs. Lothrop, Luce & Co. and of Mr. Rosaly.
Q. Can the witness testify with regard to the complaint and the answer? Did you hold any official position on the 19th of July, 1904?
A. Yes, sir.
Q. What was that public office?
A. Judge of the District Court for the Judicial District of
110 Ponce, P. R.
Q. Was a motion made to you, as Judge of the Court, by Mr. R. Ulpiano Colom —— up to page 17 of the suit No. 99 brought by W. S. H. Lothrop, against Marcelino Torres Zayas?

The plaintiff objects to the question, and the same having been allowed the plaintiff takes an exception.

A. Yes, sir.
Q. Was any order made in pursuance of said motion?

Objection and exception taken by the plaintiff.

A. Yes, sir.
Q. What was the order?

Objection and exception of the plaintiff.

A. Directing a writ of execution to be issued to the marshal to sell the properties at public auction.
Q. Have you found that order in the record of the case just referred to by you.
A. I did not find it.
Q. Did you find it in the judgment-book or in the minutes of the court?
A. I have not found it therein.
Q. In spite of that, are you sure that that order was made?

Objection and exception of the plaintiff.

A. Yes, sir, and as a consequence thereof the writ of execution was issued wherein reference is made to the said order made by the court.

Q. Was that order of the court made in pursuance of another order previously made by the District Court of Ponce?

Objection and exception of the plaintiff.

A. The order of May 3rd and June 16th of the same year, the former directed that the defendants should be required to make payment, threatening him with the sale of his poroperty in case
111 he should fail so to do, and the second order directed the sale of the property at public auction.

The court directs an entry to be made in the record to the effect that no mention whatever of the said foreclosure proceeding is made either in the minutes of this court or in the judgment-book thereof under date of July 19th, 1904; and that no page is missing in either of said books.

9. The Supreme Court erred in overruling the 10th exception thereof which literally reads as follows: "The defendant puts the following questions to the witness Richard D. Coe:

C. Does Mr. Coe know of any agreement made between Mr. Rosaly as agent of Messrs. De Ford & Co. and Mr. Torres Zayas, subsequently to the constitution of the mortgage on the property "Semil."

Plaintiff objects to the question and allowed by the court the plaintiff takes an exception.

W. Yes, sir.

C. Explain to the court what kind of an agreement that was.

Objection and exception of the plaintiff.

W. It was agreed that De Ford and Co. should advance money to Mr. Torres Zayas up to the sum of $5000 with the security of the crop, it being understood that the 5000 dollars should be paid out of the crop.

C. Did Mr. Torres Zayas issue any notes for the said amount?

Objection and exception of the plaintiff.

W. Yes, sir.

C. Is that not among these?

Objection and exception of the plaintiff.

W. These are the notes.

10. The Supreme Court erred in affirming the decision of the District Court of Ponce overruling the demurrer to the answer.

112 11. The Supreme Court erred in allowing the 9th clause of the mortgage deed, which is a public document, to be contradicted by oral evidence, contrary to the provisions of the laws in force.

12. The Supreme Court erred in holding the foreclosure proceedings to be valid, although the defendant had not been summoned to appear therein.

13. The Supreme Court erred in holding the foreclosure proceedings to be valid, notwithstanding the fact that the plaintiffs had not

personally any right to foreclose and failed to produce the mortgage notes.

14. The Supreme Court erred in holding the sale made under the foreclosure proceeding to be valid although said sale was not subject to any rate of valuation, which was contrary to the law in force.

15. The Supreme Court erred in holding that the judgment rendered in the foreclosure proceedings was valid though the same was not signed by the three judges then constituting the court.

16. The Supreme Court erred in holding the sale made in the foreclosure proceeding, to be valid though the consent of the wife of the defendant had not been obtained.

17. The Supreme Court erred in holding that the conveyance of the property under execution made by Mr. Torres in favor of Mr. Alvarado, and the constitution of a mortgage thereon in favor of the former, deprived the said Torres of the right to make any claim with regard to the annulment of the said foreclosure proceeding.

18. The Supreme Court erred in holding that the consent of Mr. Alvarado given after the sale, stating that as he had no money to make payment he could not do otherwise, deprived the said
113 Torres of the right to bring an action requesting the annulment of the foreclosure proceeding.

19. The Supreme Court erred in not rendering judgment in favor of the appellant and against the defendant Alice Lothrop, the latter having been duly summoned according to the law now in force, and her default having been entered.

20. The Supreme Court erred in holding that the marshal of the District Court of Ponce had power to sell the property foreclosed without a written judgment rendered and entered by the trial court.

21. The Supreme Court erred in holding the foreclosure proceeding to be legal and constitutional.

22. The Supreme Court erred in affirming the judgment rendered by the District Court of Ponce.

Respectfully,

C. M. BOERMAN,
Counsel for Appellant.

114 In the Supreme Court of Porto Rico.

No. 337.

MARCELINO TORRES ZAYAS, Plaintiff and Appellant,
vs.
LOTHROP, LUCE & CO., PEDRO J. ROSALY CAPÓ, and ALICE LOTHROP,
Defendants and Respondents.

Appeal from the District Court of Ponce.

Order.

SAN JUAN, PORTO RICO, *June 7th*, 1910.

The appeal taken by the plaintiff and appellant in the above entitled case from the judgment rendered by this Court on the 18th

of March 1910, to the Supreme Court of the United States, is hereby allowed; the bond to be furnished by the appellant to answer for the costs which may be caused to the adverse party by virtue of said appeal, is hereby fixed in the sum of one thousand dollars; the term of sixty days is granted for the translation and preparation of the transcript of record, and it is hereby ordered that inasmuch as the statement of the case and bill of exceptions settled by the Hon. Martin E. Gill, Judge of the District Court of Ponce, is the same statement of the case and bill of exceptions which this court has considered in deciding the appeal taken to this Court, the said statement of the case and bill of exceptions shall be included and made a part of the transcript of record to be transmitted to the Supreme Court of the United States pursuant to the appeal taken herein to the said Court.

It was agreed and signed by the justices of the Supreme
115 Court.

JOSÉ C. HERNANDEZ.
J. H. MacLEARY.
ADOLPH G. WOLF.
EMILIO DEL TORO.

116 In the Supreme Court of Porto Rico.

No. 337.

MARCELINO TORRES ZAYAS, Plaintiff and Appellant,
vs.
LOTHROP, LUCE & CO., PEDRO J. ROSALY CAPÓ, and ALICE LOTHROP,
Defendants and Respondents.

Appeal from the District Court of Ponce.

The Hon. the Supreme Court of Porto Rico:

Now comes Marcelino Torres Zayas, by Charles M. Boerman, his counsel, and states: That he has filed a notice of appeal and an assignment of errors, and that under date of the 7th of June, 1910, this Court has allowed the appeal and fixed the bond in the sum of One Thousand Dollars.

That he wishes to have in this case the benefit of an appeal and a writ of error.

He prays the Hon. Supreme Court to approve the bond filed herewith and to authorize the issuance of the writ of error and citation also filed herewith for the purposes required by law.

C. M. BOERMAN,
Counsel for Appellant.

117 In the Supreme Court of Porto Rico.

No. 337.

MARCELINO TORRES ZAYAS, Plaintiff and Appellant,
vs.
LOTHROP, LUCE & CO., PEDRO J. ROSALY CAPÓ, and ALICE LOTHROP,
Defendant- & Respondents.

Appeal from the District Court of Ponce.

Know all men by these presents that We Marcelino Torres Zayas as principal and Enrique Alvarado and Antonio Franceschi as sureties are bound unto Lothrop Luce & Co., Pedro Juan Rosaly y Capó and Alice Lothrop, in the just sum of One Thousand ($1000) Dollars to be paid to the said Lothrop Luce & Co., Pedro Juan Rosaly y Capó and Alice Lothrop, their agents, executors, administrators or legal representatives to the payment of which fully and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 15th day of June 1910.

Whereas, lately at a session of the Supreme Court of Porto Rico, in a certain case pending in said court wherein Marcelino Torres Zayas is plaintiff and appellant, and Lothrop Luce & Co., Pedro Juan Rosaly y Capó and Alice Lothrop, are defendants and appellees, a judgment was rendered against the said Marcelino Torres Zayas and the said Marcelino Torres Zayas having obtained from the said Court an order allowing an appeal or writ of error to the Supreme Court of the United States for the purpose of reversing the judgment in said case, and whereas a citation is about to be
118 issued to the said Lothrop Luce & Co., Pedro Juan Rosaly y Capó and Alice Lothrop, citing and admonishing them to appear in the Supreme Court of the United States.

Now therefore, the condition of the said obligation is such that if the said Marcelino Torres Zayas prosecutes this appeal or writ of error to effect and answers all damages and costs which may be adjudged against him in case he fails to make his plea good, then, the said obligation is to be null and void; otherwise to remain in full force and virtue.

MARCELINO TORRES.
ENRIQUE ALVARADO.
ANTONIO FRANCESCHI.

Enrique Alvarado duly sworn says: That he is a resident and property owner of Porto Rico, and that he holds visible property in Porto Rico for a value greater than $1000, over and above all liabilities and debts.

ENRIQUE ALVARADO.

No. 107.

Sworn to and subscribed before me by Don Enrique Alvarado, personally known to me, on this 15th day of June, 1910.

[SEAL.] TOMÁS CASTILLO,
Notary Public.

Antonio Franceschi duly sworn says: That he is a resident and property owner in Porto Rico and that he holds visible property in Porto Rico for a value greater than 1000 dollars over and above all liabilities and debts.

ANTONIO FRANCESCHI.

119 Sworn to and subscribed before me by Don Antonio Franceschi, personally known to me, on this 15th day of June, 1910.

[SEAL.] TOHÁS CASTILLO,
Notary Public.

Approved on this 22nd June 1910.

JOSÉ C. HERNANDEZ,
Chief Justice.

120 In the Supreme Court of Porto Rico.

MARCELINO TORRES ZAYAS
vs.
LOTHROP, LUCE & CO., PEDRO J. ROSALY Y CAPÓ, & ALICE LOTHROP.

Motion for Extension of Time.

Charles M. Boerman, counsel for appellant Marcelino Torres Zayas duly sworn says: That the transcript of the record to be transmitted to the Supreme Court of the United States is very voluminous and contains about One Hundred Thousand words, which have to be translated from the Spanish into the English language, and the term of 60 days allowed by law to file the record in the Supreme Court of the United States is not sufficient to make the translation and transcript and to have the same properly certified. That he has information to the effect, and believes, that 60 days in addition to the time given by law will be required to make that work.

Therefore, your petitioner prays this Hon. Court to make an order allowing an extension of 60 days in addition to the term of 60 days given by law.

C. M. BOERMAN,
Counsel for Appellant.

Sworn to and subscribed before me by Charles M. Boerman, personally known to me on this 29th day of June 1910.

A. F. CASTRO,
Secretary of the Supreme Court.

121 In the Supreme Court of Porto Rico.

MARCELINO TORRES ZAYAS
vs.
LOTHROP, LUCE & CO., PEDRO J. ROSALY Y CAPÓ, & ALICE LOTHROP.

Order.

SAN JUAN, PORTO RICO, *June 29th*, 1910.

In accordance with the foregoing motion, the term fixed in the citation issued in the above entitled case, pursuant to the appeal taken therein to the Supreme Court of the United States is hereby enlarged until the 1st of November 1910.

It was so ordered and signed by the Hon. Adolph G. Wolf, Associate Justice of the Supreme Court.

ADOLPH G. WOLF.

122 In the Supreme Court of Porto Rico.

MARCELINO TORRES ZAYAS
vs.
LOTHROP, LUCE & CO., PEDRO J. ROSALY CAPÓ, and ALICE LOTHROP.

Agreement.

The parties hereby agree to allow sixty days in addition to the term given by law for the transmission of the record in this appeal to the Supreme Court of the United States.

C. M. BOERMAN,
Counsel for Appellant.
J. T. SOTO,
Counsel for Appellee.

123 In the Supreme Court of Porto Rico.

No. 337.

MARCELINO TORRES ZAYAS, Plaintiff and Appellant,
vs.
LOTHROP, LUCE & CO., PEDRO J. ROSALY CAPÓ, and ALICE LOTHROP,
Defendants & Respondents.

Appeal from the District Court of Ponce.

Order.

SAN JUAN, PORTO RICO, *13th of October*, 1910.

The time fixed in the citation issued pursuant to the appeal filed in the above entitled case for filing the transcript of record in the

Supreme Court of the United States, heretofore extended until the 1st of November, 1910, by order of this Court dated the 29th of June last, is hereby further extended up to the 1st of December, 1910.

It was agreed by the Court and the acting Chief Justice signs; attest.

J. H. MacLEARY.

A. F. CASTRO, *Secretary.*

124 In the Supreme Court of Porto Rico.

No. 337.

MARCELINO TORRES ZAYAS
vs.
LOTHROP, LUCE & Co., PEDRO JUAN ROSALY CAPÓ, and ALICE LOTHROP.

Action involving: 1st. The nullity of a foreclosure proceeding and judicial sale, as well as that of a mortgage and of certain registration made in the Registry of Property; 2nd. Claim of certain rents and proceeds of fruits; and 3rd. Damages.

Findings of Fact.

1. On the 26th day of February, in the year 1901, the plaintiff Don Marcelino Torres Zayas, who was then married to Doña Mercedes Laborde Perez, entered into a mortgage contract with Mr. William Sturgis Hooper Lothrop, by a public deed, wherein he admitted to be owing to the said Mr. Lothrop the sum of forty six thousand dollars, which he bound himself to pay on the 21st day of February, 1905, and he bound himself to pay ten per cent per annum, as interest on the said amount, the payment of the interest to be made at the expiration of each year, on the 21st day of February of each of the ensuing years; and as security of said principal and interest, a voluntary mortgage was con-
125 stituted upon a coffee plantation named "El Semil," which was given a value of forty thousand dollars, and also upon other properties. It was also stipulated in the contract that the forty six thousand dollars should be represented by eight notes issued in favor and to the order of the creditor, and for the amount of five thousand seven hundred and fifty dollars each, bearing interest at the rate of ten per cent per annum, and all payable on the 21st day of February 1905. The mortgage deed was properly recorded in the Registry of Property.

2. The said mortgage deed contains a clause which literally copied reads as follows: "Ninth. The contracting parties agree that all the produce of the two properties firstly described shall be delivered to Messrs. De Ford & Co. of this city, to be sold by them at the highest price that can be obtained in this market, so as to de-

duct from the value of said produce the amount of the interest which shall be paid annually to the creditors, and the balance, if any, shall be delivered to the debtor Mr. Torres Zayas for the expenses and maintenance of the said properties, the latter being bound to apply to the payment of the principal of the debt such sum as may exceed the amount of said expenses." The witness Mr. Rosaly, who was corroborated by the witness Mr. Coe, avers, in opposition to the denial made by Mr. Torres Zayas, that the agreement above mentioned was substituted by another, whereby it was agreed that from the value of said produce the current liabilities of Mr. Torres Zayas should first be paid, Mr. Rosaly having testified that he thinks that the above modification was made after the constitution of the mortgage, and that it was made verbally. Up to the time of the default in payment of interest, accounts of the receipts of Lothrop Luce & Co., from the plantation Semil were rendered each month to the debtor Torres Zayas, and of his debits and credits, and the latter never questioned the correctness of
126 these accounts.

3. That, by mutual error of the parties, the said notes were drawn in the name of Messrs. De Ford & Co., instead of William S. Lothrop, and six of them were endorsed by Messrs. De Ford & Co. in favor of Mr. James H. Buchanan, who endorsed the same to Riggs National Bank; another note was endorsed by De Ford & Co. in favor of S. V. R. Crosby and by the latter to Henriett M. Crosby; and another note was endorsed by De Ford & Co., with the following endorsements: "Pay First National Bank Boston, Mass. or order Union Trust Co. of the District of Columbia, Edson B. Olds, Treasurer." And with another endorsement which reads: "Pay to the order of Miss Alice Lothrop the sum of thirty two hundred and fifty dollars, present amount due on this note. Value received. Ponce, April the 7th, 1906, pro Lothrop Luce & Company, P. J. Rosaly."

The text of the said notes reads as follows: "Ponce, Porto Rico, Feb. 25th, 1901. $5750.00. Four years after date, for value received, I promise to pay to the order of Messrs. De Ford & Co., at the place of business of De Ford & Co., Boston, Mass., Five Thousand Seven Hundred and Fifty dollars, with interest at the rate of ten per centum per annum, interest payable annually, for such time as said principal sum or any part shall remain unpaid, having on this date executed as security for the payment of said sum and interest to Henry De Ford, Trustee, a certain first mortgage upon a certain coffee plantation—596 cuerdas—known as "Semil," situated in the municipal district of Juana Diaz; and also a certain first mortgage upon certain pasture lands—400 cuerdas—known as "La Monserrate," situated in the municipal district of Ponce. This is the first (second, third, etc.) of a series of eight notes for five thousand seven hundred and fifty dollars each, making in all forty six thousand dollars. Marcelino Torres."

127 At the trial the defendant offered as proof the notes described by the mortgage, cancelled. The question of the correctness of the description of the payees of the notes was raised

between the parties in a separate suit and the error in the description was corrected therein by a judgment of the Court, Torres Zayas being one of the parties.

4. That Mr. Zayas in pursuance of the stipulations contained in the mortgage deed, delivered the produce, that is, the coffee of the property Semil, to Messrs. De Ford & Co., and did so also in the year 1904. The value of the produce delivered in the year 1904 exceeded the amount of the interests due in that year, but this amount was credited by Messrs. De Ford & Co. to the current account of Mr. Torres Zayas to pay for the maintenance of the property and other expenditures, in such a manner that the interest due in that year did not appear to have been paid in the book of the firm De Ford & Co.

5. That on the 25th day of April, 1904, Mr. William S. H. Lothrop instituted a foreclosure proceeding in the District Court of Ponce against Don Marcelino Torres Zayas, with regard to the property Semil. That in the said proceeding, the mortgage deed and the certificate of the Registrar of property with regard to the registration of the property, were exhibited, but the eight notes referred to were not filed with the complaint, nor produced. That a notification for payment of the interest was made to Don Marcelino Torres, but not to his wife. That no citation, nor any copy of the complaint, had been delivered either to him or to his wife. That the order requiring payment to be made was signed by two regular judges of the three who constituted the court, and by Mr. H. S. Belaval. That with the exception of the order requiring the debtor to pay, no order or proceeding of the court was ever notified
128 to them during the course of the whole foreclosure proceeding, nor were them required to pay any amount whatsoever after the auction sale took place. That on the 16th of June, 1904, an order was made, signed by two of the three judges who then constituted the court, directing the mortgaged property to be sold at public auction within the term of twenty days, that is, the first sale to take place within that time after the fixing of the notices and publication thereof in a local newspaper, it being stated in said notices that no bid which was not sufficient to cover two thirds of the estimated value of the property would be admitted. That the said notices did not contain, however, the value given to the property which was to serve as rate of valuation for the purposes of the auction sale, nor was it stated, either, in said notices, that bidders had to make a deposit of 10%, as required by said order. That on the 30th of July, 1904, the marshal of the District Court of Ponce attached the property Semil, and on the 12th of September of the same year, sold the same at public auction, which was the only one had, by virtue of a writ of execution issued by the Secretary of the District Court of Ponce, on the 22nd day of July, 1904, wherein the following is contained: "That on the 19th day of July, 1904 judgment was rendered in favor of W. S. Lothrop against Torres Zayas, for the sum of $4600,00 as interest due." That the judgment alleged to have been entered on the 19th of July, 1904, and referred to in the above writ does not appear in the record of the said proceeding for the foreclosure of mortgage, although the pages of said record

are all properly numbered, and not a single page is missing, all its pages being complete without erasures or amendments of any kind; and that neither in the official judgment book of the court, nor in the minutes of the Secretary, nor in the minutes book of the court, relating to the month of July, 1904, nothing appears to show that on the 19th day of July, 1904, nor *in* any other day, any
129 judgment had been entered, or any order for attachment or execution, made, nor any reference is therein made with regard to the said proceeding for the foreclosure of mortgage, above mentioned. That by the oral testimony of Mr. José Torres Soto, counsel for the defendant in this suit, and who was judge of the District Court of Ponce during the month of July, 1904, it was shown that on the 19th day of July, 1904, he ordered, as judge of said court, that a writ of execution should be issued to the marshal, directing him to sell the property at public auction, and as a consequence thereof the writ of execution was issued, that is to say, the writ above referred to. The only other known witnesses to the order of the court referred to, namely the attorney who brought the proceeding and the secretary of the court, were dead. The return of the marshal recites the order of the court of July 19, 1904. That at the only auction sale had, which took place on the 12th of September, 1904, the mortgaged property was sold to P. J. Rosaly for $500.00, plus the costs and the expenses of the proceeding, the purchaser having bound himself to make the payment of the mortgage constituted in favor of Mr. W. S. H. Lothrop. That all the incidents above referred to, regarding the foreclosure proceeding, appear in the registrations made in the Registry of Property, where the property Semil has been recorded.

6. That, subsequently, on the 7th of October, 1905, the marshal of the District Court of Ponce executed a deed of judicial sale of the said property Semil in favor of the defendant Don Pedro Juan Rosaly y Capó, and in the same date Mr. Rosaly y Capó constituted a mortgage thereon for the sum of $30000.00 in favor of the mercantile partnership Lothrop Lucie & Co., who are also defendants in this suit.

7. That Mr. Rasaly y Capó purchased the property at the
130 auction sale as trustee of the mercantile partnership De Ford & Co., of which Mr. William Sturgis H. Lothrop was a member. That, afterwards, the mercantile partnership Lothrop Luce & Co. was constituted, of which partnership Mr. William S. H. Lothrop was also — member, the said partnership acting as successor to the partnership De Ford & Co. That on the 7th of October, 1905, when Mr. Rosaly constituted the mortgage in favor of Lothrop Luce & Co. he was an attorney-in-fact for the latter firm, and that the actual owners of the property at that time were Lothrop Luce & Co.

8. That on the 25th day of April, 1904, Don Marcelino Torres y Zayas sold, by a public instrument, the said property Semil to Don Alejandro Alvarado y Laborde, for the sum of $50000.00, the purchaser constituting in the same deed of sale a mortgage upon the said property in favor of the vendor to secure the payment of the purchase price, the vendor having admitted to have received only $2500.00 amount of a debt formerly contracted by the vendor

in favor of the purchaser, and the balance of the $50000.00, which constituted the purchase price, was owed by the vendor, and as security for said balance the mortgage referred to was constituted. That Mr. Zayas testified that this sale was simulated. That on the 20th of April, 1907, Mr. Alejandro Alvarado y Laborde, with the consent of Mr. Torres y Zayas, rescinded, by a public instrument, the aforesaid deed of sale and mortgage, stating, among other reasons, that Mr. Alvarado's wife had not given her consent to the constitution of the mortgage, and stating, further, therein, that said rescission has been mutually and privately agreed upon, in the year 1905, and that they have agreed to cause said rescission to appear in a public instrument, under this date.

9. That on the 5th day of September, 1905, an order was made by the District Court of Ponce in the foreclosure proceeding
131 of the mortgage constituted upon the property Semil, whereby Don Alejandro Alvarado was required to make payment within ten days of the price of the sale of the property Semil made in favor of Don Pedro Juan Rosaly, and of the interest due thereon and costs, the said Alvarado having been warned that in case he should fail so to do a writ should be issued to the Registrar of Property for the cancellation of the registration of ownership therein made in his favor with regard to said property. That as a consequence of this notification for payment made to Mr. Alvarado, the latter made in court, the following statement, which literally reads as follows: "In the District Court for the Judicial District of Ponce, P. R.—To the Hon. José Tous Soto.—Now comes before Your Honor Alejandro Alvarado, of age and a resident of Juana Diaz and states: that under date of the 16th of September, a requirement was made to him by order of this Court, to pay over to Don Pedro Juan Rosaly, within the following ten days, the sum which the latter had in his turn paid for the property Semil, at the auction sale of said property which was had by virtue of a foreclosure proceeding instituted by Mr. William Sturgis Hooper Lothrop against Don Marcelino Torres y Zayas, the said Alvarado having been warned that in case he should fail so to do a writ should be issued to the Registrar of Property for the cancellation of the registration of ownership made therein in his favor in regard to said property and to appear before the court within that time, having previously notified Mr. Rosaly, to show sufficient reasons why he should be excused from obeying the said order. That although he notified within that time, by his counsel Mr. Llorens Torres, an opposition to the petition of Mr. Rosaly, be abandoned the same later on by failing to appear before the court to sustain the same at the date set for the hearing
132 thereof. And that as he desires to make known in a clear manner his acquiescence in the motion of the petitioner, he now appears and states: that being unable to pay to Mr. Rosaly the sum for which the plantation Semil was sold, and the interest and cost, he joins in the petition made by him, that the registration of ownership which he, Alvarado, had upon the said property should be cancelled. Ponce, September 29th, 1905.—(Signed) Alejandro

Alvarado.—Sworn to before me this 29th day of September, 1905.—W. V. Robbins, United States Commissioner."

10. That on the 3rd of June, 1904 Mr. Alejandro Alvarado Laborde brought a suit in the District Court of Ponce against Mr. William Sturgis H. Lothrop praying for a declaration of nullity of the proceeding for the foreclosure of mortgage, instituted by Mr. Lothrop against Mr. Torres Zayas, and made, also, a motion requesting a preliminary injunction to be issued to stay the auction sale of the property Semil. That on the 5th day of August, 1904, the following order was made in that suit, which literally copied reads as follows: "Injunction in case No. 186.—Alejandro Alvarado, counsel Llorens.—vs.—William Sturgis Hooper Lothrop.—To stay a foreclosure proceeding.—The court order- the dismissal of this case because it has been twice set for hearing and counsel has failed to appear to-day."

11. That Mr. William Sturgis Hooper Lothrop died in the year 1906, his only heiress being his widow, the defendant Alice Lothrop.

12. That on the 14th day of May, 1906, Mr. Pedro Juan Rosaly brought a suit in the District Court of Ponce against Lothrop Luce & Co. and Alice Lothrop—involving the extinction of a mortgage,—and that by consent of the defendant the following judgment was therein entered, which literally copied reads as follows: "Suit No. 141.—Pedro Juan Rosaly vs. Lothrop Luce & Co. and Alice Lothrop.—Extinction of a mortgage.—Whereas: on the 14th day of May, 1906, Don Pedro Juan Rosaly filed, in the office of the secretary of this court, a complaint against the partnership Lothrop, Luce & Co. and Alice Lothrop, wherein a prayer for a declaration of extinction of a mortgage, for thirty seven thousand dollars, constituted upon the property Semil, was made; substantially alleging therein that the plaintiff was the owner of the said property Semil, described in the complaint, that he had acquired the same at public auction in the foreclosure proceeding instituted by Mr. W. S. H. Lothrop against Don Marcelino Torres Zayas, with the mortgage of thirty seven thousand dollars referred to, which was constituted to secure the payment of certain obligations payable to order, each for five thousand seven hundred and fifty dollars; that the said notes or obligations payable to order had been paid by him to Messrs. Lothrop Luce & Co., who are the owners thereof, as shown by a public instrument executed on the 6th of April, 1902, before Don Luis Yordán Dávila, a Notary Public; and that the said mortgage constituted upon the plantation Semil was so constituted by Don Marcelino Torres Zayas in favor of Don W. S. Lothrop, whose only and universal heiress is the defendant Mrs. Alice Lothrop.—Whereas: the defendants appeared in said action and served upon the plaintiff an offer to allow judgment to be taken against them without trial, as prayed for in the complaint, under section 313 of the Code of Civil Procedure, which offer was duly accepted by the plaintiff.—therefore, by order of the court, judgment is hereby entered in this case against the defendant, and the mortgage constituted upon the plantation Semil, which is the property of Don Pedro Juan Rosaly, for the sum of thirty-seven thousand dollars, is hereby declared to be

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extinguished, the said mortgage having been constituted by
134 Don Marcelino Torres Zayas in favor of Mr. William Sturgis Hooper Lothrop, and recorded in the Registry of Property of Ponce, P. R., the description of the said plantation Semil being as follows: "A coffee plantation, named "El Semil", situated in the ward Villalba-arriba, in the municipal jurisdiction of Juana Diaz, covering an area of five hundred and thirty five cuerdas and sixteen hundredths, equivalent to two hundred and ten hectares fifty three ares and ninety two centiares, with a wooden dwelling house, covered with zinc, warehouse, and other dependencies. The said property is bounded in the North by a public road and by lands belonging to Juan Felix Baez, Socorro García and the succession of Don Severo Cegarra; on the East, by lands belonging to Don Domingo Olivieri, the succession of Catalina Matos, to Lucas Negrón, Julián Negrón, to the said Don Domingo Olivieri, to the succession of Juan Angel Rosario, to Tomás Negrón and to José Torres; on the South, by lands belonging to Don José Genaro Rivera, José del Carmen and Domingo Negrón, Marcial Serrallés, Eduvigis Rodríguez, Ramón Sanchez, Pedro Morales and Don Antonio Santi; and on the West, by a public road and lands of José del Carmen Negrón, Juan Zaragoza and the succession of Severo Cegarra", no special condemnation of the costs being made.—Judgment entered in the city of Ponce, P. R. this 18th day of May, 1906.—Francisco Barnés Plaja.—Secretary District Court."

The foregoing findings of fact are hereby adopted and certified by the Supreme Court of Porto Rico, and it is directed that the same be filed as part of the record in this case, and transmitted as such to the Supreme Court of the United States, instead of the statement of the case which contains the evidence-at-large.

JOSÉ C. HERNANDEZ.
J. H. MacLEARY.
ADOLPH G. WOLF.

135 En el Tribunal Supremo de Puerto Rico.

MARCELINO TORRES ZAYAS
vs.
LOTHROP, LUCE & CIA. te al.

Præcipe for Record.

To the Secretary of the Court.

Please to prepare and transmit to the Supreme Court of the United States the whole Record in this case, substituting the Findings of facts made by this Court for the exposition of the case sent by the lower court, omitting the motions and orders of extension of time, and including the stipulation for extension to transmit this record made between the attorneys and filed herein.

C. M. BOERMAN.
Attorney for Appellant.

136 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Hon. Judges of the Supreme Court of Porto Rico, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of Porto Rico, before you, between Marcelino Torres Zayas, plaintiff and appellant, and Lothrop Luce and Company, Pedro Juan Rosaly y Capó and Alice Lothrop, defendants and appellees, a manifest error has happened, to the great prejudice and damage of the said plaintiff and appellant, Marcelino Torres Zayas, as is said and appears by the petition herein.

We, being willing that error, if any has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, disti-ctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justices of the Supreme Court of the United States in the City of Washington, District of Columbia, together with this writ, so as to have the same at the said place on the 60th day from this date, that the record and proceedings aforesaid be- inspected, the said Supreme Court of the United States may cause further to be done therein to correct those errors what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 22nd day of June 1910.

Attest my hand and seal of the Supreme Court of Porto
137 Rico at the Clerk's office at San Juan, Porto Rico, on the day and year last above written.

[Seal Supreme Court of Porto Rico, United States of America.]

A. F. CASTRO,
Secretary of the Supreme Court of Porto Rico.

Allowed this 22nd day of June, 1910.

JOSÉ C. HERNANDEZ,
Chief Justice of the Supreme Court of Porto Rico.

138 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Lothrop, Luce and Company, Pedro Juan Rosaly y Capó and Alice Lothrop, Greeting:

You are hereby cited and admonished to be and appear at the Suprem Court of the United States, held at the City of Washington in the District of Columbia, within sixty days from the date of this writ, pursuant to an appeal and writ of error filed in the Clerk's office of the Supreme Court of Porto Rico, wherein Marcelino Torres Zayas is plaintiff in error and appellant, and you are defendants in

error and appellees, to show cause, if any there be, why the judgment in the said appeal and writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 22nd day of June, A. D. 1910, and of the Independence of the United States the one hundred and twenty fourth.

JOSÉ C. HERNANDEZ,
Chief Justice of the Supreme Court of Porto Rico.

Attest:

[Seal Supreme Court of Porto Rico, United States of America.]

A. F. CASTRO,
Secretary.

[Endorsed.]

Received this writ this 22nd day of June, 1910, and served the same by sending by registered mail a true copy thereof to the within named Pedro Juan Rosaly and to Jose Torres Soto the attorney of record to Ponce, P. R., where they reside. This at San Juan, P. R., this 22nd day of June 1910.

S. C. BOTHNELL,
Marshal.

139 Supreme Court of Porto Rico.

Island of Porto Rico.

I, Antonio F. Castro, Secretary and Reporter of the Supreme Court of Porto Rico, do hereby certify: that the foregoing is a true copy, faithfully translated into the English language, of all papers filed, and proceedings had and entered in a certain cause lately pending in said court, wherein Marcelino Torres Zayas, is plaintiff and appellant, and Lothrop Luce & Co., Pedro Juan Rosaly Capó and Alice Lothrop, are defendants and respondents; that I have compared the same with their respective originals, and that they are true and faithful transcripts therefrom, and of the whole thereof, having omitted only the statement of the case settled by the trial judge, which has been substituted by the findings of fact prepared and certified by the Supreme Court of Porto Rico, and the motions and orders of extension of time filed in the record, this transcript of record having been prepared in accordance with a præcipe filed by counsel for appellant herein.

In witness whereof I hereunto set my hand and affix the seal of said Supreme Court, at the city of San Juan, Porto Rico, this 1st

day of November, in the year of our Lord, one thousand nine hundred and ten.

[Seal Supreme Court of Porto Rico, United States of America.]

A. F. CASTRO,
Secretary and Reporter of the Supreme Court of Porto Rico.

$1 stamp, cancelled Nov. 1, 1910. A. F. C.

Endorsed on cover: File No. 22,404. Porto Rico Supreme Court. Term No. 435. Marcelina Torres Zayas, appellant and plaintiff in error, vs. Lothrop, Luce & Company, Pedro Juan Rosaly y Capo, and Alice Lothrop. Filed November 16th, 1910. File No. 22,404.

No. 17

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1912

Office Supreme Court, U.
FILED.
JAN 10 1913
JAMES H. McKENNE
Clerk

MARCELINO TORRES ZAYAS

Appellant

vs

LOTHROP LUCE & CO., PEDRO JUAN ROSALY CAPO AND ALICE LOTHROP

Apellees.

SUGGESTION OF DEATH

AND

MOTION

Now comes Charles M. Boerman of counsel for the apellant and suggest to the Court the death of Pedro Juan Rosaly Capo one of the apellees and moves the Court for an order on his heirs and legal representatives to make appearance not later than within ten days

after the begining of the next Term of this Court, and that in case they do not appear the case will be proceeded with in their default.

C. M. BOERMAN.
of Counsel

Marcelino Torres Zayas declares under oath that he is the apellant in the above entitled cause and that Pedro Juan Rosaly Capo, one of the apellees therein has since the appeal was proceeded with deceased this life.

MARCELINO TORRES ZAYAS.

Sworn to before me
his day of January 1913

FILED.
APR 8 1912
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1911.

MARCELINO TORRES ZAYAS,
Appellant,
vs.
LOTHROP, LUCE & CO., PEDRO JUAN ROSALY CAPO, and ALICE LOTHROP,
Appellees.

No. 1063.

On Appeal from the Supreme Court of Porto Rico

APPELLANT'S BRIEF

C. M. BOERMAN,
Counsel for Appellant.

HERBERT CLARKE, PRINTER
PARIS
1912

Supreme Court of the United States.

OCTOBER TERM, 1911.

MARCELINO TORRES ZAYAS,
APPELLANT.
vs.
LOTHROP, LUCE & Co.,
PEDRO JUAN ROSALY and
ALICE LOTHROP,
APPELLEES.
No. 435.

On Appeal from the Supreme Court of Porto Rico.

I

APPELANT'S BRIEF.

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ERRATA

On page 6 line 14 add as follows: Rosaly, defendant, was given by defendant's counsel the following question about a supposed modification of clause of the mortgage deed:—Q" "State the stipulation submitted to you by Mr. Torres".—The plaintiff objecting and then excepting.—Ans: According to the stipulation containing in the deed Mr. Torres Zayas had no right to have funds advanced to him for the expenses of the crop; about the middle of the year 1902 he told us that he had the property mortgaged; it was impossible to raise money to advance to him to cover said expenses, and it was stipulated that money could be obtained having notes signed by him, said money to be applied by him to the payment of said expenses, and the money so advanced should be paid out of the funds with preference to anything else".

On page 6 line 26 add as follows: Alejandro Alvarado was given by plaintiffs counsel the following question: "Was the sale made by Mr. Torres an actual sale?" "Which question was not permitted by the Court, the plaintiff excepting.

On page 6 line 29 add as follows: José Soto, attorney for the defendants and a former Judge of the Ponce District Court, was examined by himself, as to a sup-

posed order made by him while Judge, which order does not exist on record, neither in the minutes of the Court, nor in the judgment book thereof. Q. "What was the order?" Objection of plaintiff and exception. Ans. "Directing a writ of execution to be issued to the Marshall to sell the properties at public auction."

Supreme Court of the United States.

OCTOBER TERM, 1911.

MARCELINO TORRES ZAYAS,
APPELLANT,
vs.
LOTHROP, LUCE & CO., PEDRO JUAN ROSALY CAPO, and ALICE LOTHROP,
APPELLEES.

No. 435.

On Appeal from the Supreme Court of Porto Rico.

I.

APPELANT'S BRIEF.

The appeal comes up to this Court from a judgment entered by the Supreme Court of Porto Rico confirming a judgment of the District Court of Ponce in the Island of Porto Rico.

The appellant here has brought proceedings in the said District Court of Ponce, in which he alleged that he was the owner of a certain coffee plantation, named "Semil," situated in the said District. That he has borrowed a certain sum of money from William S. H. Lothrop and that as security for the payment of said sum he instituted a hipothek or mortgage on the said estate, giving a number of mortgage notes to the order of said mortgagee That the interests on said mortgage were payable yearly in the following way, stipulated in the said mortgage contract, to wit: that the mortgagor should

deliver yearly the coffee crop to the commercial firm of De Ford & Co., which firm was made Trustee of the mortgagee for that purpose, and that from the price money realized on the sale of the coffee so delivered there should be paid the yearly interest due on the said mortgage first of all, and that then from any sum remaining there may be paid other debts or liabilities of the mortgagor to the mortgagee. That the said firm of De Ford and Company, Trustees of the mortgagee, did so appropriate for several years the money realized from the sales of the coffee delivered to them by the mortgagor, in paying first yearly the interest due on the said mortgage and from any sum remaining after such payment, the other debts or liabilities of the mortgagor to the mortgagee, and that they did so up to the year 1904, in which year they contrary to the stipulation of the mortgage contract appropriated all the money realized in that year from the sale of the coffee crop, which sum realized exceeded the interests due that year, for the payment of some personal debts and liabilities of the said mortgagor, leaving thereby apparently the interests of that year unpaid, which were due on the 26th of February 1904.

That thereupon on the 3rd of May, 1904, Mr. William S. H. Lothrop, the mortgagee, instituted in the District Court of Ponce so called summary proceedings against the mortgagor for the sale of his property under the mortgage. That in those proceedings the only notice given to the mortgagor was a requirement of payment of the interest, in order to avoid the sale of the mortgaged property. That neither was the mortgagor served with a summons nor with a copy of the complaint. That the said proceedings were against him alone, not joining his wife with him in the proceedings. That on the 3rd of May, 1904, when the order of requirement of payment against him was made by the Court of Ponce, only two judges of the three, then constituting the Court, have signed that order. That on the 16th of June, 1904, another order signed by two judges only was made by that Court that the mortgaged property be offered at public auction. That no judgment was ever rendered in the said proceedings. But that nevertheless on the 30th of July, 1904, the Marshal of said Court

without authority thereto levied on the mortgaged property, and on the 12th of September 1904, sold it at public auction to Pedro Juan Rosaly, defendant herein, for the sum of $500.00 besides the costs, he making himself responsible for the payment of the mortgage to the mortgagee.

That in the notice of sale published in the local newspaper, there was not stated, as the Law requires, the value of the estate, given to it in the mortgage, in order that it may serve as a limit of the minimum offer to be accepted at the public auction, and that at the sale such valuation was also not taken in consideration.

It was further alleged by the mortgagor complainant, that in the summary proceedings the mortgage notes were not exhibited as required by the Law, and that they were at the time of the institution of the summary proceedings the property of other persons to whom they were endorsed and in the hands of those persons and not of the mortgagee, who therefore had no right to institute proceedings at all. That Rosaly was only Trustee of the other defendants.

The complainant Torres Zayas therefore asked the Ponce Court, to annul and set aside the orders made in the said summary proceedings and to declare that the said mortgaged property is still of right the property of the mortgagor.

The complainant also asked for judgment for the value of the rents and crops for the years succeeding the said summary proceedings, said rents and crops having been appropriated by the defendants herein. (*Record P.*) [1-11].

The defendants having demurred to the complaint the Ponce Court overruled said demurrer and the defendants then, with the exception of Mrs. Alice Lothrop, widow of Mr. W. S. H. Lothrop and his only heir, who never entered an appearance, filed their answer to the complaint, in which besides several specific denials of the complaint they put up several defences, to wit:—That the mortgagor has in the meantime sold the mortgaged property to one Alvarado, who manitested that he had no opposition to the cancellation of an inscription of ownership in the Registry of Property, as he could not pay the price of the auction sale; that the said

Alvarado has instituted similar proceedings to this against William S. H. Lothrop and that a judgment in favor of the said Lothrop was rendered by the Court; that the action now exercised is prescribed; and that Mr. Rosaly has satisfied to the holders of the notes Messrs. Lothrop Luce & Co. the sums due, and that therefore no judgment could be given without declaring the mortgage subsistent and the complainant obliged to pay. (*Record P.*) 25-28.

The complainant then specifically traversed the defence of prescription and also demurred to the defences put in the answer as to the sale to Alvarado. This demurrer was overruled by the Court. (*Record P.* 29-30.

One of the defendants, Mrs. Alice Lothrop, not being a resident of Porto Rico, the complainant upon the proper affidavits presented to the Court, obtained an order of service by mail and publication, which service was accordingly made, and said Mrs. Alice Lothrop not having entered an appearance at the stipulated time, her default was noted and a judgment by the Court against her prayed for by the complainant. (*Record P.*) 40-41.

The complainant presented to the Court an amendment to the complaint with certain particulars, which amendment was not permitted by the Court. (*Record P.*) 43-44.

The Court of Ponce rendered judgment against the complainant and in favor of the defendants, including the defendant Mrs. Alice Lothrop, who was duly summoned by substituted service in conformity with an order of Court, and who had not appeared to defend.

An appeal was then taken from the District Court of Ponce to the Supreme Court of Porto Rico, and said Supreme Court confirmed the judgment of the District Court.

II.

ASSIGNMENT OF ERRORS.

First.

The Supreme Court of Porto Rico erred in considering that the summary proceedings instituted by the mortgagee against the mortgagor were authorized by the Law and Constitution then in force.

SECOND.

The Supreme Court of Porto Rico erred in holding that in the said summary proceedings there was no necessity of the service of a summons or a delivery of a copy of the complaint.

THIRD.

The Supreme Court erred in holding that the mortgagee could foreclose without being in possession or the ownership of the mortgage notes and without presenting them in the summary proceedings.

FOURTH.

The Supreme Court erred in considering the sale of the mortgaged property in public auction without a minimum type or valuation as a valid sale.

FIFTH.

The Supreme Court erred in holding the order of the sale signed by two judges only, as valid.

SIXTH.

The Supreme Court erred in holding the proceedings and sale valid without the consent or summons of the wife of the mortgagor.

SEVENTH.

The Supreme Court erred in holding that a clause of a contract written in a public document could under the Laws of Porto Rico be contradicted by oral testimony.

EIGHTH.

The Supreme Court erred in holding that the simulated sale by Torres Zayas to Alvarado deprived the first of the right of action to annul the summary proceedings.

NINTH.

The Supreme Court erred in holding that the declaration of Alvarado, that he could not pay the price at the auction sale,

and that therefore he does not oppose the inscription in favor of Rosaly, deprived the mortgagor of the right of action to annul the summary proceedings.

TENTH.

The Supreme Court erred in holding that the Marshal had authority to sell the mortgaged property without a judgment having been rendered by the Court and registered in the Clerk's Office.

ELEVENTH.

The Supreme Court erred in sustaining the overruling of the second exception of the plaintiff in the Bill of Exceptions.

TWELFTH

The Supreme Court erred in sustaining the overruling of the third exception of the Bill of Exceptions.

THIRTEENTH

The Supreme Court erred in sustaining the overruliug of the fifth exception of the Bill of Exceptions.

FOURTEENTH

The Supreme Court erred in sustaining the overruling of the sixth exception of the Bill of Exceptions.

FIFTEENTH

The Supreme Court erred in sustaining the overruling of the seventh exception of the Bill of Exceptions.

SIXTEENTH

The Supreme Court erred in sustaining the overruling of the eighth exception of the Bill of Exceptions.

SEVENTEENTH

The Supreme Court erred in sustaining the overruling of the ninth exception of the Bill of Exceptions.

EIGHTEENTH

The Supreme Court erred in sustaining the overruling of the tenth exception of the Bill of Exceptions.

NINETEENTH

The Supreme Court erred in rendering judgment confirming the judgment of the District Court of Ponce.

III

CONSIDERATION OF THE LAWS APPLICABLE TO THE CASE AT BAR.

In order to properly understand the merits of the case at bar, it is necessary to review and bear in mind the changes which were made in the Laws of Porto Rico, specially during the time of the summary proceedings on the mortgage, to annul which proceedings the case at bar was instituted.

When the Island of Porto Rico was invaded by the American Army, the Commanding Officer announced that all the laws then in force will be continued in force except as afterwards changed by the Military Government. Changes were made by Military Orders up to the time of the establishment of the Civil Government of Porto Rico by the Congress of the United States in an Act temporarily to provide Revenues and a Civil Government for Porto Rico, and for other purposes, passed April the 12th, 1900. Section 8 of said Act provides "that the Laws and Ordinances of Porto Rico now in force shall continue in full force and effect except as altered, amended, or modified hereafter, or as altered or modified by Military Orders and Decrees in force when this Act shall take effect, and so far as the same are not inconsistent or in conflict with the Statutory Laws of the United States not locally inapplicable, or the Provisions thereof, until altered, amended, or repealed by the Legislative authority hereinafter provided for Porto Rico or by Act of Congress of the United States."

The chief among those laws in force at that time were: The Civil Code of 1889, the Code of Commerce of 1885, the Mortgage Law of 1893 with the Regulations adjunct thereto, and the Law of Civil Procedure of 1885. On the 1st of March, 1902, an amended Civil Code was enacted by the Legislature of Porto Rico, and on the 1st of July, 1904, while the sum-

mary proceedings on the mortgage which are sought to be annuled in the case at bar, were in tramitation and pending in the District Court of Ponce, a new Code of Civil Procedure, passed by the Legislature of Porto Rico, went into effect. It will be therefore very material in this case to inquire how far these summary proceedings on the mortgage were affected by the change of the Law of Civil Proceedure during their tramitation and while they were pending.

The old Mortgage Law and Regulations and the old Commercial Code are still in force in Porto Rico, with the exception of very slight and few amendments made either by Military Orders or by the Legislature of Porto Rico.

Having called the attention of the Court to the state of legislation in Porto Rico at the time of the pendency of the summary proceedings on the mortgage, which are sought to be annuled, we pass to the questions of Law involved in the consideration of the errors, by us assigned to have been committed by the lower Courts in the case at bar.

That this Court has jurisdiction on this appeal is evident from the record, as the property claimed and involved is far exceeding the value of $5,000.00.

Royal Insurance Company *vs.* Martin, 192 U.S. 149.

We will then proceed to consider: first, the constitutionality of the Law authorizing the summary proceedings on mortgages; second, the nullity of those proceedings on account of their being not in conformity even with the requirements of the Laws then in force; third: errors committed by the Court in application of the Law to the facts as found by the Court; and fourth, errors committed by the Court in the ruling on the evidence, which materially affect the findings of fact and the result of the case.

I

The Summary Proceedings under the Mortgage Law of Porto Rico are contrary to the Provisions of the Constitution of the United States.

The summary proceedings providing for the sale of mortgaged property are specified in the General Regulations for the

Execution of the Mortgage Law for Cuba, Puerto Rico and Philippines. Art. 175 of these Regulations provides as follows: "The summary proceedings referred to in this Section cannot be stayed by means of proceedings in the nature of a demurrer, nor by any other proceedings at the instance of the debtor or of the third party in interest, nor that of any other person presenting himself as interested party, except in the following cases: "Naming as exception first, the documentary proof of a criminal proceeding on account of the forgery of the mortgage document; second, a claim by a third person with a recorded title to the estate in question; third, a certificate of the Register of Property of the cancellation of the mortgage in the books of the Registry.

It will therefore be seen that there is really no defence to the proceedings on a mortgage under this law. The mortgagor cannot have his day in Court. The Court virtually does not act as a Court, and simply as an executive officer would act. It is therefore depriving a man of his property without due process of Law, within the meaning of those words in the Constitution.

That the general guarantees of life, liberty and property contained in the Constitution of the United States apply to Porto Rico, can be seen from the following statements in the opinion issued by Mr. Justice Brown in the case of Downes v. Bidwell, 182 U.S. 277 and 282. On the former page we read as follows: "To sustain the judgment in the case under consideration, it by no means becomes necessary to show that none of the articles of the Constitution apply to the Island of Porto Rico. There is a clear distinction between such prohibitions as go to the very root of the power of Congress to act at all, irrespective of the time and place, and such as are operative only 'throughout the United States' or among the several States."

Thus, when the Constitution declares "no bill of attainder or ex post facto law shall be passed," and that "no title of nobility shall be granted by the United States," it goes to the competency of Congress to pass a bill of that description.

Perhaps, the same remark may apply to the First Amendment, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press; or the right of the people to peacefully assemble, and to petition the government for redress of grievances." We do not wish, however, to be understood as expressing an opinion how far the bill of rights contained in the first eight amendments is of general and how far of local application."

On page 282 in the same opinion we read: "We suggest, without intending to decide, that there may be a distinction between certain natural rights, enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights, which are peculiar to our own system of jurisprudence. Of the former class are the rights to one's own religious opinions and to a public expression of them, or, as sometimes said, to worship God according to the dictates of one's conscience; the right to personal liberty and individual property; to freedom of speech and of the press, the free access to courts of justice; to *due process of law* and to an equal protection of the laws; to immunities from unreasonable searches and seizures, as well as cruel and unusual punishments; and to such other immunities as are indispensable to a free government. Of the latter class are the rights of citizenship, to suffrage, Minor v. Happersett, 21 Wall, 162, and to the particular methods of proceedure pointed out in the Constitution, which are peculiar to Anglo-Saxon jurisprudence, and some of which have already been held by the States to be unnecessary to the proper protection of individuals."

It is unnecessary for us to discuss the point that all the Laws in force in Porto Rico are so only through the Act of Congress which declared them after the change of sovereignty to be such laws in the above cited Article 8 of the Organic Act of Porto Rico of April the 12th, 1900, and that therefore all these laws are only as far in force and effect as they do not contradict or

annul the General Guarantees of the Constitution for life, liberty and property.

We will now quote here one of the best definitions given by this Supreme Court to the words "*Due Process of Law.*"

"It is sufficient to observe here, that by "due process" is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode proscribed by the law; it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them *an opportunity to be heard* respecting the justice of the judgment sought. The clause in question, therefore, means that there can be no proceedings against life, liberty, or property, which may result in the deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights."

Due process of law signifies a right to be heard in one's defence. Hovey *v.* Elliot, 167, U.S 409.

The essential elements of the process of law are *notice and opportunity to defend.*

Simon *v.* Craft, 182 U.S. 427.

An opportuniiy of defence is an essential element in the conception of due process of law.

Health Department *v.* Trinity Church, 17 N.Y. Supp. 510, 512.

Due process of law requires an orderly proceeding adapted to the nature of the case, in which the citizen has an opportunity *to be heard, and to defend, enforce,* or *protect his rights. A hearing or an opportunity to be heard is absolutely essential, and a necessity of notice of the time and place of such hearing is conclusively implied.* Stuart *v.* Palmer, 74 N.Y., 183,189.

"Law of the land," as used by the Constitution, requires a hearing before the condemnation of property, and judgment before dispossess on. Ieck *v.* Anderson, 57 Cal. 251, 253.

The rule of justice which forbids the taking of property

except according to the law of the land, means that there shall be no taking, no condemnation, before *hearing*.

First Nat. Bank v. Swan, 3 Wyo., 356.

Due process of law requires that the party shall be properly brought into Court, and that he shall have an opportunity when there, to prove any fact which, according to the Constitution and the usages of the Common Law, would be a protection to him or his property.

People v. Essex County Supr's., 70 N.Y., 228, 234.

Wright v. Cradlebaught, 3 Nev., 341, 349.

State v. Cutshall, 110 N.C. 538.

The numerous attempted definitions of due process of law to be found in the books, when summed up, amount at least to but different expressions of the principle that every one is entitled to have notice of any proceeding by which his life, liberty or property may be affected, and to be admitted to make a defence in a proceeding which, following the forms of law, is adapted to the nature of the case, and is in conformity with natural aud inherent justice.

Hood River Lumbering Co. v. Wasco County, 35 Or. 498.

"Due process of law" means the same as the Law of the Land, and as a general rule, involves an opportunity before a proper Tribunal, under an established procedure, to make contest in defending or enforcing a legal right.

Simmons v. Western Union Tel. Co., 63 S.C. 525.

The phrases "Law of the Land" and "Due process of Law," as used in Constitutions, are similar in meaning. They both imply a judgment by an authorized Tribunal *after an opportunity for a hearing*. There must be some sort of a Tribunal, some opportunity for a hearing, and some sort of an adjudication. These requirements at least are ingrained in the fundamental law. The Legislature cannot make that "Due process of Law" or the "Law of the Land" which is not that in the Constitutional sense.

BENNET v. DAVIS, 90 Me. 102.

"Due process of law" necessarily implies and includes the right to answer and to contest a charge.

BABCOCK v. CITY OF BUFFALO, Sheld. 317, 340.

While it is practically impossible, and certainly unwise, to attempt to give a concise and comprehensive definition of "Due process of Law" and "Law of the Land," it is certain that notice to the parties to be affected of the claim against them, *and an opportunity to be heard upon it*, are essential elements of every proceeding in a Court of Justice which can be said to constitute due process of law or to be in accord with the Law of the land. The basic principle of English Jurisprudence is, that no man shall be deprived of life, liberty or property without "due process of law," without a course of legal proceedings, according to those rules and forms which have been established for the protection of private rights. Such a course must be appropriate to the case and just to the party affected It must give him notice of the charge or claim against him, and an opportunity to be heard respecting the justice of the order or judgment sought. The notice must be such that he may be advised from it of the nature of the claim against him, and of the relief sought from the Court if the claim is sustained; *and the opportunity to be heard must be such that he may, if he chooses, cross-examine the witnesses produced to sustain the claim, and produce witnesses to refute it if a question of fact is in issue; and if a question of law is presented, the opportunity to be heard must be such that his counsel may, if they desire, argue the justice and propriety of the judgment or order proposed.*

Judicial orders or judgments affecting the life or property of citizens in the absence of such a notice and opportunity to be heard to the party affected, are violative of the fundamental principles of our laws, and cannot be sustained.

In *re*-Rosser, 101 Fed. 562, 567.

While the phrase "Due process of Law," as applied in this country, is more or less controlled by its application to the facts and conditions of the particular case, yet in its universality it implies the right of the person to be affected by a judicial proceeding against him *to be present before the tribunal which pronounces judgment upon the question of life, liberty or property in its most comprehensive sense; to be heard by testimony or otherwise; and to have the right of controverting by proof every material fact which bears on the question of right in the matter involved. If any question of fact or liability be conclusively presumed against him, there is not due process of law.*

Holden v. Harvey, 167, U.S. 366.

Many definitions of "Due process of Law" have been attempted, but it is believed they all come to this:—That a party shall have his day in Court—trial—which means the right of each party, plaintiff or defendant, to introduce evidence to establish his right to recover on one hand, and to establish his defence of the part of the other; after which comes judgment.

Any judgment which is rendered without these modes of proceedure, or in disregard of them, is not *due process of Law*, any other proceedure condemns before it hears, does not proceed upon inquiry, but renders judgment before trial.

Jensen v. Union Pac. R. Railway Co., 6 Utah, 253.

"Due process of Law" implies notice and hearing or an opportunity to be heard. *Where such is not required or provided for in the act, such act is unconstitutional, even though notice of the fact of the thing to be done was given.*

In *re*-Jensen, 59, N.Y. Supp. 653-655.

It is not enough that the parties may by chance have notice or that they may as a matter of favor have a hearing. *The law*

must require a notice to them, and give them the right to a hearing, and an opportunity to be heard.

San Mateo County v. Southern Pac. Railway Co., 13 Fed. 722,752.

We do not wish to burden the Court with more citations, although we could triplicate them.

Any law which deprives a man of his property, without providing for the opportunity of a full defence is unconstitutional, and as we have established before by quoted decisions of this Court, the provision of the Constitution for due process of law does apply to Porto Rico. We have also established that the Laws of Porto Rico have no other origin, be they the old Laws, or be they the Laws enacted after the change of sovereignty, except the authority of the Congress of the United States, which makes them the Law of Porto Rico by the Organic Act, or the so called "Foraker Act," cited above.

The appellant here, the plaintiff in the Court below, was deprived of his property without due process of law, as the Law itself under which he was so deprived provided that he should have no defence interposed and should have no hearing, neither argument, either on issues of fact or of law. The Court below should therefore, have declared the so called judgment against him null and void.

2.

The provisions of the Mortgage Law itself were not complied with in the proceedings to foreclose the mortgage and therefore those proceedings are null and void.

In the first place, the District Court of Ponce never acquired jurisdiction over the then defendant in the foreclosure proceedings, now plaintiff and appellant. The Regulations for execution of the Mortgage Law of 1893, in force in Porto Rico at the time of the foreclosure proceedings, provide in Art. 176, as follows:—"The provisions of the law of Civil Procedure

in force in Cuba, Porto Rico, and the Philippines shall be applicable to these proceedings as supplementary, when not in conflict with the provisions contained in the Mortgage Law and these Regulations."

The Law of Civil Proceedure in 1885, in force in Porto Rico at the time of these foreclosure proceedings, provides in Art. 524, as follows:—"After the complaint, together with the necessary copies, has been presented, it shall be referred to the defendant or defendants, who shall be summoned to appear in the action, within a period of nine days, which cannot be extended."

As this fundamental requirement of the Law of Civil Proceedure and, we may say of any and all laws of proceedure, is not in conflict with any provisions contained in the Mortgage Law Regulations, it was certainly obligatory. That it was not complied with can be seen from the findings of fact which constitute a part of the record in this case.

Therefore the Court never had jurisdiction to render any judgment in the foreclosure proceedings.

SECOND.—Art. 169 of the Regulations for the execution of the Mortgage Law provides as follows:—"The following must be presented with the first document drawn in the proceedings: First . . . Second, the instrument or instruments of the credits, with a memorandum of their record, and with the formalities required by the Laws of Civil Proceedure for authorizing a writ of execution." As it can be seen from the findings of fact, the mortgage notes have never been presented with the complaint in the foreclosure proceedings. Moreover, they have been endorsed to other persons and it is therefore presumed that they still were in the hands of such other persons, and that the plaintiff in the foreclosure proceedings was then not the real creditor and therefore not entitled to the foreclosure of the mortgage.

See also Art. 128 of the Mortgage Law, and Art 153 of the same.

Art. 128 requires expressly that the judicial proceedure shall consist in a complaint accompanied "by the instrument constituting the debt."

Art. 153 reads as follows:—"In a mortgage created to guarantee negotiable obligations or deeds to bearer, when the mortgage interest is alienated or assigned, it shall be understood that the latter is transferred together with the obligat ons or with the deed, it being unnecessary to give notice thereof to the debtor, or to record the transfer in the Registry."

THIRD.—Section 1328 of the Civil Code of 1902 provides as follows:—"Notwithstanding the power which the husband has as administrator, he shall not have the power to give, to sell and to buy or bind for a consideration the real estate of the conjugal partnership without the express consent of the wife. Every sale or agreement which the husband may make in respect to the said property in violation of this Section and the other provisions of this Code, or in fraud of the wife, shall be null and shall not prejudice her or her heirs."

Section 1322 of the same Code provides:—"All the property of the marriage shall be considered as partnership property until it is proven that it belongs exclusively to the husband or to the wife."

In the foreclosure proceedings the wife of the mortgagor has not been notified or cal'ed in, nor has her consent to the sale of the property been obtained.

FOURTH.—The Mortgage Law in Art. 127, provides:—"In the mortgage shall appear the value of the estate as appraised by the contracting parties, *which shall serve as a basis for the only judicial sale which can take place, if, the period of the loan having expired, it does not appear in the registry of property that said loan has been paid.*"

The same is provided in Art. 172 of the Regulations for the execution of the Mortgage Law in which article it is expressly provided of the obligations on the mortgage, that "Their total amount shall be the minimum acceptable at the public sale" and that the notice of sale shall state so.

That a sale under the Mortgage Law in the epoch of the mortgage proceedings referred to, without fixing this amount as a minimum bid, was null and void, has been repeatedly decided by the Supreme Court of Porto Rico. (José Rosado v. Registro de la Propiedad, decided 20th of February, 1905.)

Emilio Jimenez v. Julio Brenes, decided 8th of February, 1905.

That these requirements of the Mortgage Law have not been complied with in those foreclosure proceedings can be seen from the findings of fact, a part of this record.

In the case of José Rosado v. Registrador de la Propiedad de Caguas, the Supreme Court of Porto Rico says:—"The summary proceeding established by the Mortgage Law in order to foreclose mortgage credits is an essential and integral part of that law which has not been abrogated by the new Code of Civil Proceedure, neither by any other legal disposition, and therefore while it exists Art. 127 of said law, to the effect that in a mortgage document shall be stated the value of the property on which the contracting parties have agreed, in order that it may serve as a basis for the judicial sale in case the payment of the mortgage in due time is not inscribed in the Registry of the Property, must be complied with."

In the case of Emilia Jimenez v. Julio Brenes Aponte, the Supreme Court of Porto Rico, says: "We have already declared that the said summary proceeding has not been abrogated by the new Code of Civil Procedure, and we have stated so on the 2nd of February, 1905, in the appeal interposed by José Rosado Canas against a note put by the Registrar of Property of Caguas, and we have not encountered any reasons whatever which could change our criterium."

Fifth.—All the orders or so called judgments in the foreclosure proceedings referred to were signed by two judges only. The Court at that time consisted of three judges, and although it may be true that the majority of two is sufficient as against the third to render a judgment, but still it is necessary and indispensable that all the three judges shall take part in the trial or vote, although one of them may dissent.

The District Courts of Porto Rico, as constituted at the time of the referred foreclosure proceedings, were instituted by general orders No. 118, on August the 16th, 1899, under the Military Government of Porto Rico No jury trial was provided in said order. Article 10 of said order reads as follows: "Each District Court will be composed of three judges, one of whom shall be presiding Judge, and who jointly shall constitute a bench for civil and criminal business." It will be seen from the word "jointly" that a Court of two judges only was not properly constituted.

It was so held by the Supreme Court of Porto Rico, in the case of the People of Porto Rico v. Pedro S. Battistini, in which the Court says that: "The appeal could not proceed, only because a proper exception was not noted to the substitution of the third judge by a lawyer." Now we want to state that in our case no exception was necessary or even possible, because the proceeding was without permission to us to take part in it, or to be heard at all.

Sixth.—There was never a proper judgment ordering the sale of the property rendered in the said foreclosure proceedings. As it can be seen from the findings of fact in this record no such judgment could be found in the record of said proceeding in the Ponce District Court, neither in the judgment books or the judgment roll or in any minutes or writings in said Court.

That except in case of the loss of the record, the record itself is conclusive can be seen from Greenleaf on Evidence, Vol. 1, Art. 275, note 305 G., citing various decisions.

Seventh.—There was only one public auction in the foreclosure proceedings, contrary to the provisions of Art. 172 of the Regulation for the execution of the Mortgage Law, which provides for three public auctions. Besides the sale took place within 18 days and not in the term of 20 days as provided in the said Art. 172 of the Regulations.

It will be seen that even if the summary proceedings of foreclosure provided for by the Mortgage Law of Porto Rico

should have been valid under the Constitution and considered "due process of law," which it is certainly not, as it gives no opportunity for defence, still that very same law was disregarded in so many of its vital provisions that the judgment or foreclosure is null and void for failing to comply with all such provisions.

Moreover the District Court of Ponce had no jurisdiction as we stated before for the reason that the mortgagor has never been properly summoned, and therefore all the proceedings of said Court are null and void.

We quote from Freeman on Void Execution, Judicial and Probate Sales, Section 2.: "A void judgment, order or decree, in whatever Tribunal it may be entered, is in legal effect nothing." "All acts performed under it, and all claims growing out of it, are void." "Hence a sale based on such a judgment has no foundation in law. It must certainly fall. Judicial proceedings are void when the Court wherein they take place, is acting without jurisdiction."

Section 5 *idem.* says: "Jurisdiction of the defendant is obtained by his voluntary appearance in the action, or by the service of process upon him. If a defendant neither appears, nor is served with process, a judgment against him is void."

"The proceedings may be in rem. But if notice is exacted by the Statute, either by publication, or by personal service of a citation, a substantial compliance with the statutes is a prerequisite to obtaining authority to proceed."

Beckett v. Sullivan, 7, Cal. 215.
Gray v. Howes, 8 Cal. 562.
Randolf v. Bryan, 44 Cal. 370.

3.

A Clause in a contract incorporated in a public instrument cannot be modified or extinguished except by another writing contained in a public instrument under the Law of Porto Rico.

There is a Statute of Fraud in force in Porto Rico, similiar

to the Statutes of Fraud enacted in the different States of the Union. It is chiefly contained in Section 1247 of the Civil Code of Porto Rico, which reads as follows: "The following must appear in a public instrument:

1. Acts and contracts the object of which is the creation, modification, or extinction of property rights on real property."

The end of the Section cited reads as follows: "All other contracts, in which the amount of the prestations of one of the two contracting parties exceeds $300.00, must be reduced to writing even though it be private".

It will be seen that, under the law of Porto Rico, clause 9 of the mortgage, which provides that all the money realized from the sale of the coffee of the mortgaged estate must be applied by the mortgagee's Trustee first to the payment of the interest due on the mortgage, and the remainder only to satisfy other debts, could not be proven to be changed except by a new contract in writing, incorporated in a public instrument.

It was therefore error for the Court to consider that that clause has been changed orally. It follows that, the clause still being in effect, the interests due on February 1904, by the mortgagor to the mortgagee were fully paid as the value of the coffee delivered by the mortgagor to the Trustee of the mortgagee on that date was more than sufficient to pay the interest then due. Therefore the proceeding to foreclose was a fraudulent proceeding, as the Trustee of the mortgagee had no right to appropriate the money realized to any personal liability of the mortgagor and to make appear that the interests on the mortgage were due, contrary of the stipulations in clause 9 of the Mortgage.

4.

The Transfer of the Property by the Mortgagor to to Alvarado, being a Simulated Transfer, does not deprive the Mortgagor of his Rights as against the Mortgagee.

As can be seen from the findings of fact the sale of that property to Alvarado was a simulated sale, without any intention

to defraud anybody, as the mortgage to Lothrop was mentioned and described in the instrument of sale. In that instrument of sale there was also instituted a mortgage for the purchase money in favour of Marcelino Torres, the plaintiff and appellant, which virtually left him the real interested party as far as the mortgage to Lothrop was concerned. It was further proven that said simulated sale was rescinded, first orally and then by a public instrument.

It is therefore obvious that Macelino Torres, the mortgagor lost no rights whatever as against Lothrop, mortgagee.

The fact that Alvarado was called in by the Court in the proceedings of the foreclosure of the mortgage by Lothrop, and that Alvarado declared, that he, not being able to pay the auction sale price, makes no objection to the deed to Rosaly the purchaser at the auction sale, does not change the position of the parties in any respect whatever, as Mr. Rosaly, the purchaser at the auction sale, was not a third party, but a Trustee of the mortgagee and his commercial associates in the firm, who had full knowledge of all the clauses of the mortgage and of all the facts in the case, including the fact that the interests on the mortgage at the time of the foreclosure were fully paid.

There is no innocent party in this case who could have suffered any through the simulated sale of the property by Marcelino Torres to Alvarado, for whatever purpose, which is immaterial here, that simulated sale was made.

Therefore, Marcelino Torres has not lost any right to the said property, which he could not now claim under the Law.

5.

One of the Defendants, Mrs. Alice Lothrop, was in Default in the proceedings and therefore Judgment should have been given as against her

Service upon this defendant, who was absent from Porto Rico at the time, was made by publication and mailing. But as this is a proceeding in rem, in its nature, such service, authorized by the Code of Civil Proceedure in Porto Rico

Section 94 and 95, was valid. This defendant did neither appear nor answer. And therefore judgment should have been entered against her according to Section 194 of the said Code Civil Proceedure subdivisions 2 and 3.

The Court, therefore, erred in not entering judgment against her.

6.

ERROS COMMITTED BY THE COURT IN THE RULINGS UPON THE EVIDENCE

The error as far as the rejection of the testimony offered to which the second exception of the Bill of Exceptions refers is obvious.

The third exception of the Bill of Exceptions refers to the admission of the testimony as to the change of the clause 9 of the mortgage made according to the only witness, Mr. Rosaly one of the defendants, *as it appears to him*, after the mortgage was instituted in a public instrument, by and through an oral agreement. It is clear that under Section 1247 of the Civil Code of Porto Rico such evidence is not admissible, as it would cater to possibilities of fraud. Such kind of testimony is excluded by the Statutes of Fraud of every State and by the general policy the Law, as well as by the specific provisions of the Code of Porto Rico.

The same reasoning refers to the exception ten of the Bill of Exceptions.

The exception seven of the Bill of Exceptions refers to the refusal of the Court to admit testimony as to the character of the instrument of sale made by Marcelino Torres to Alvarado, the same as the exception eighth of the Bill of Exceptions.

The error of the Court in refusing to admit such testimony is evident, as the Law of Evidence, in Art. 25, provides that where the validity of the agreement is in dispute, oral evidence may be given as to that fact. See also Art. 28 of the same Law of Evidence of 1905.

As to the ninth exception of the Bill of Exceptions, which refers to the erroneous admission by the Court of the testimony of the attorney for the defendants, a former judge of the Ponce District Court, as to the fact that he made an order of sale in the foreclosure proceedings, while such an order or judgment is not to be found in the records of said Court, neither in the minutes, nor in the judgment roll, nor in any writing in said Court, and specially in view of the fact that the record has not been lost and is found complete and intact without any erasure or any other defect or anything missing, it is obvious that such testimony should not under the circumstances have been allowed.

Den et dem. Weatherhead *v.* Baskerville, 11 How. 329.
Minor *v.* Tillotson, 7 Pet. 99.
Bouldin *v.* Mossie, 7 Wheaton 122.
Simpson *v.* Dall., 3 Wall. 460.

The errors committed by the Court and noted in the rest of the exceptions are just as evident as those discussed, and in consideration of those errors alone, the judgment of the lower Court should be annulled.

7

Before closing, we wish to discuss some of the special defences made in the answer of the defendants to the complaint.

First, as to the third defence of the answer, that Mr. Alvarado, to whom a document of sale was made by Marcelino Torres, has consented to the auction sale, we want to say that, as can be seen from the Findings of Fact, it was not a real consent freely made, but a forced one, as the reason for it is given in the same document which contains the consent, that is to say, that Mr. Alvarado did not have then the money paid at the auction sale, and therefore could not do anything except permit the deed to Rosaly to be inscribed in the Registry. Besides, this act of Alvarado could not prejudice in any way the rights of Marcelino Torres to claim his property and damages for the spoliation thereof as against the defendants herein.

The fourth defence of the answer pleads *res judicata*.

But, from the evidence, it appears only that Mr. Alvarado has abandoned a suit brought by him and an injunction asked by him as against Mr. Lothrop, and the Court's order was simply a non-suit on account of want of appearance of the plaintiff, as provided for in Section 192 of the Code of Civil Proceedure of Porto Rico, sub-division 3. It will be seen by reading said Section that no judgment can be given upon such a non-suit, and only upon a dismissal mentioned in the first two sub-divisions of said Section. Such an order is certainly not of the nature of *res judicata*.

The fifth defence of the answer alleges prescription, citing Articles 37 of the Mortgage Law, 140 of the Code of Civil Proceedure, and 1869 of the Civil Code.

Art. 37 of the Mortgage Law applies only to actions for rescission or determination of title where a third person is involved and where such third person was not a party to the fraud, and where the causes are not duly expressed in the Registry and where the suits are brought for the purpose of defrauding creditors. There is nothing in the case at bar which could make applicable to it said Article of the Mortgage Law. There are no third innocent parties in this case, and Mr. Rosaly the defendant and purchaser of the mortgaged property at the auction sale, according to his own testimony, acted in behalf of Mr Lothrop the mortgagor and his associates in the commercial firm, as their agent and Trustee, and he knew of all the facts of the case, including the fact that the interests were not due at the time of the foreclosure, as he is the only one witness as to the pretended change of clause 9 of the mortgage.

Section 140 of the Code of Civil Proceedure of Porto Rico does not apply either, as the term of the six months given to relieve a party from a judgment, order or other proceeding taken against him through his mistake, inadvertance, surprise, or excusable neglect, or the term of one year for a party to answer to the merits of the original action where such party has not been personally served with a summons, cannot apply

to the case at bar, as the law did not allow any defence to the merits at all in the summary proceedings.

Neither can apply Art. 1869 of the Civil Code which prescribes one year for actions to recover or retain possession, and for actions to demand civil liability for grave insults or calumy and for obligations arising from fault or negligence, specially mentioned therein.

The action in the case at bar was brought under Art. 175 of the General Regulations for the Execution of the Mortgage Law for Cuba, Porto Rico and the Philippines. The provisions of this Article are literally as follows: "All other action that may be brought by the debtor as well as by the third parties in interest and other interested persons, including those regarding the nullity of the title or of the proceedings, or regarding the lapse, constitution, extinction, or amount of the debt, shall be discussed in the proper final trial, without ever causing a stay of tho summary action for posssession or avoiding them. The competency to take cognizance of these declaratory suits shall be determined by the usual rule." This refers to rule laid down in the Old Law of Civil Proceedure Art. II.

As the summary proceedings provided for in said Article of the Regulations are special proceedings under the Mortgage Law which simply provides that the summary proceedings shall go on without any defense and that an action may be separately and independently of those proceedings brought to recover the property or damages therefore, it is clear that General Provisions of Art. 1869 of the Civil Code about recovering possession or fault or negligence, do not apply to the case at bar, as neither do the other Articles cited in the answer of the defendant herein. The only prescription applicable is that for real action which has not yet expired.

In *resumen* : the plaintiff Marcelino Torres has been deprived of his property, first : without due process of law, that is to say under a Law which is contrary to the Provisions of the Constitution guaranteeing life, liberty and property; second : in a proceeding irregular in every respect, as it did

not comply even with that inconstitutional Law, a proceeding in which there was no jurisdiction in the Court for want of service, in which no judgment was ever rendered according to Law, in which two judges only of a Court of three, who could act only jointly under the law, have acted alone, in which a sale took place without judicial authority and contrary to the Provisions of the Law providing for a mortgage sale; third, in a proceeding in which it was alleged, that interests on the mortgage were due, while they were really paid.

The action instituted in the case at bar is an action specially provided for such cases by the same Mortgage Law of Porto Rico and has not prescribed. There is no third party or innocent purchaser in this case as defendant Rosaly acted only as Trustee or agent of the mortgagee and knew of all the facts of the case including the fact of the payment of interests.

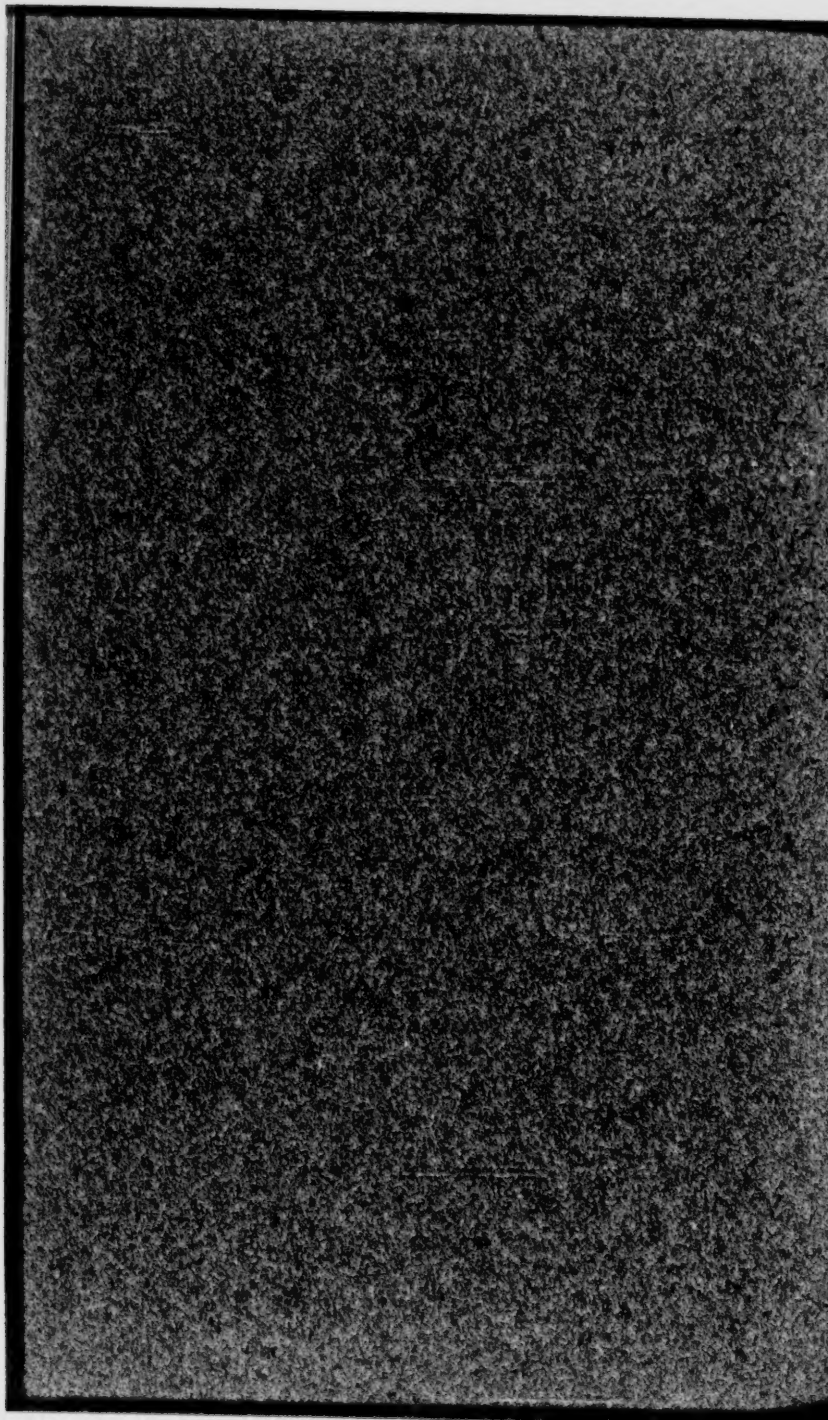
A clearer case of fraud could never be established.

The learned Court below has nevertheless refused to annul those summary proceedings, contrary to the Law, and said learned Court has also committed numerous errors in the rulings upon the testimony offered, for which errors alone the judgment appealed from should be revoked.

We therefore, respectfully submit that the judgment of the Supreme Court of Porto-Rico herein be set aside and that a judgment be ordered in favor of the appellant herein, according to justice.

CHARLES M. BOERMAN,
of Counsel for the Appellant.

[redacted]



Supreme Court of the United States

OCTOBER TERM, 1913

No. 168

MARCELINO TORRES ZAYAS,
APPELLANT AND PLAINTIFF IN ERROR,

v.

LOTHROP, LUCE & COMPANY, PEDRO JUAN ROSALY CAPO, AND ALICE LOTHROP,
APPELLEES AND DEFENDANTS IN ERROR

On Appeal from and In Error to the Supreme Court of Porto Rico

BRIEF FOR LOTHROP, LUCE & COMPANY AND THE HEIRS OF PEDRO JUAN ROSALY CAPO, APPELLEES AND DEFENDANTS IN ERROR

MALCOLM DONALD
Of Counsel for Lothrop, Luce & Company and the Heirs of Pedro Juan Rosaly Capo, Appellees and Defendants in Error

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BRIEF FOR LOTHROP, LUCE & COMPANY AND THE HEIRS OF PEDRO JUAN ROSALY CAPO, APPELLEES AND DEFENDANTS IN ERROR.

I.

THE FACTS.

The appellant, Marcelino Torres Zayas (the plaintiff in the lower court), instituted this suit on January 15, 1908, in the District Court for the Judicial District of Ponce. The prayer of the bill is for a decree declaring that certain proceedings foreclosing a mortgage on a plantation of the appellant were null and void, and that

said property still belongs to the appellant, and directing that he be put in possession thereof. The bill also prays an accounting of profits and damages against either Alice Lothrop or Pedro Juan Rosaly.

The District Court dismissed the appellant's suit and affirmed the validity of the foreclosure proceedings. Torres Zayas thereupon appealed to the Supreme Court of Porto Rico, where the judgment of the District Court was affirmed. Thereupon he took the present appeal and writ of error to this court.

By the Act of April 2, 1874, C. 80, Sec. 2, 18 Stat. 27–28, which governs writs of error and appeals from Porto Rico, the present case can come before this court only on appeal, and the writ of error must therefore be disregarded. On appeal the findings of fact of the Supreme Court of Porto Rico must be accepted, and, therefore, the only questions which can be raised are questions of law apparent on the face of the record.

Garzot v. *De Rubio*, 209 U. S. 283.

On February 26, 1901, Torres Zayas, the appellant, entered into a mortgage contract with William S. H. Lothrop, in which he admitted that he owed said Lothrop forty-six thousand dollars ($46,000), which he agreed to pay February 21, 1905, with interest payable annually on February 21st of each year. As security, he executed a mortgage on the Semil plantation, which, by the mortgage deed, was given a valuation of forty thousand dollars ($40,000), and also a mortgage upon certain other property. The principal of the mortgage was represented by eight notes for five thousand seven hundred and fifty dollars ($5,750) each, the interest being payable annually

on February 21st and the principal being due February 21, 1905. This mortgage was duly recorded, and its validity is not questioned (Record, p. 70).

The mortgage further provided that all the produce of the mortgaged premises should be delivered to Messrs. De Ford & Company to be sold by them, they to deduct from the proceeds the amount of the interest to be paid annually to the creditors and to hand over any balance to Torres Zayas for the expenses and maintenance of the mortgaged properties, Torres Zayas being bound to apply to the payment of the principal of the debt such sum as might exceed the amount of said expenses (Record, pp. 70–71).

It appears that subsequently Torres Zayas needed money for the immediate expenses of the cultivation of his property, and by an oral agreement it was arranged that from the value of the products Zayas's current expenses should be paid before the payment of interest (Record, pp. 71, 56).

Interest was paid in 1902 and 1903. In 1904 the value of the products delivered to Messrs. De Ford & Company exceeded the interest due that year, but, in accordance with the above-mentioned oral agreement, Torres Zayas drew on the proceeds to meet his current liabilities, and did not leave sufficient to pay the interest for the year 1904; and Torres Zayas never made any payment to make up the deficiency (Record, pp. 71, 72, 56).

Accounts of the receipts from the plantation were rendered each month to Torres Zayas, and also accounts of his debits and credits, and Torres Zayas never questioned the correctness of these accounts (Record, pp. 71, 56).

On April 25, 1904, Lothrop instituted proceedings in the District Court of Ponce against Torres Zayas to

foreclose the mortgage upon the Semil plantation because of the above default in the payment of the interest due in 1904. A notification for payment of interest was made to Torres Zayas in these proceedings, but not to his wife (Record, p. 72).

On April 25, 1904, the same day that the foreclosure proceedings were instituted, Torres Zayas transferred the mortgaged premises to one Alejandro Alvarado, who mortgaged the same back to Torres Zayas for forty-seven thousand five hundred dollars ($47,500) (Record, p. 73).

On June 3, 1904, Alvarado, as owner of the Semil plantation, brought suit in the District Court, praying that the foreclosure proceedings brought by Lothrop be declared null, and he further asked for an injunction to stay the proposed auction sale of the premises. On August 5, 1904, the court ordered the suit brought by Alvarado dismissed, because it had been twice set for hearing and counsel had failed to appear (Record, p. 75).

The foreclosure proceedings brought by Lothrop resulted in a judicial sale of the property at auction on September 12, 1904. The purchaser was Pedro Juan Rosaly, who purchased for five hundred dollars ($500) plus the costs and expenses of the proceedings and the assumption of the mortgage in favor of Lothrop. Before receiving a deed of the property, namely, on September 5, 1905, Rosaly brought a petition in the foreclosure case, setting out that he was unable to obtain a proper deed of the property because of the fact that title to it was registered in the name of Alvarado; and an order was made by the District Court whereby Alvarado, as the then record owner of the property,

was required to make payment within ten days of the price of the sale of the Semil plantation, he being warned that if he failed to make such payment a writ would issue for the cancellation of his registration of ownership. Alvarado thereupon appeared in court, and formally stated that, although he had notified by his counsel an opposition to the petition, he had subsequently abandoned the same by failing to appear at the date set for the hearing thereof; and that he now desired to make known in a clear manner his acquiescence in the motion, asserting "that being unable to pay to Mr. Rosaly the sum for which the plantation Semil was sold, and the interest and cost, he joins in the petition made by him [that is, by Rosaly] that the registration of ownership which he, Alvarado, had upon the said property should be cancelled." This statement was sworn to before the United States Commissioner (Record, pp. 74, 75).

Thereafter on October 7, 1905, the Marshal of the District Court of Ponce executed a deed of judicial sale of the Semil plantation to said Rosaly. Rosaly took title in trust for Lothrop, Luce & Company (Record, p. 73).

Rosaly having paid the amount of the mortgage indebtedness due on the original mortgage, formal proceedings were brought by Rosaly in May, 1906, which resulted in the cancellation of the original mortgage from Torres Zayas to Lothrop (Record, p. 75).

On April 20, 1907, Alvarado and the appellant, Torres Zayas, rescinded the deed of sale and mortgage from Zayas to Alvarado, made April 25, 1904. Torres Zayas testified at the trial that the transfer by him to Alvarado was a simulated sale (Record, p. 74).

Lothrop died before the present suit was brought,

and Mrs. Lothrop is his heir. No service was made on Mrs. Lothrop, who was a non-resident, except by publication.

The appellant, Torres Zayas, made no objection to the application of the proceeds of the crop by Messrs. De Ford & Company in 1904 to payment of his current liabilities, in accordance with his agreement, although he received monthly accounts showing the same, and no objection in any other respect to the foreclosure proceedings until nearly four years after the same were instituted, when he filed the present suit on January 15, 1908. He never offered to pay the principal of the mortgage on the Semil plantation, to wit, forty-six thousand dollars ($46,000), which was due in 1905 and which was paid by the appellees, nor the interest due thereon; nor did he offer to make any such payment in the present suit.

In the District Court the appellant contended that the proceeds of the crop should have been applied in 1904 by Messrs. De Ford & Company to payment of the interest due on the mortgage, and that they should not have permitted him to draw out said money in accordance with his oral agreement, and that, therefore, there was no default in the payment of interest in 1904. He further contended that in certain respects the procedure prescribed by the mortgage law was not observed in the foreclosure proceedings brought by Lothrop. Being unsuccessful in the District Court, on appeal to the Supreme Court he insisted upon these contentions, and further set up that the District Court had erred in certain rulings as to the admissibility of evidence. Being again unsuccessful, he has prosecuted the present appeal, in which he reiterates his previous contentions and further

contends, for the first time, that the Mortgage Law of 1893, under which the foreclosure proceedings took place, is unconstitutional.

II.

THE QUESTIONS INVOLVED.

It is believed that all of the arguments advanced by the appellant may be grouped under the following four heads:—

1. That the Mortgage Law is unconstitutional.
2. That the requirements of the Mortgage Law were not observed in the foreclosure proceedings instituted by Lothrop.
3. That the mortgage interest due in 1904 must be deemed to have been paid out of the proceeds of the crop of that year.
4. That the District Court erred in certain of its rulings as to the admissibility of evidence.

The appellees propose to meet these contentions by showing:—

1. (*a*) That the question of the constitutionality of the Mortgage Law is not open on this appeal, since it is raised for the first time in this court.

(*b*) That the Mortgage Law is constitutional.

(*c*) That appellant, through his privy, Alvarado, waived his right, if any, to object to the constitutionality of the Mortgage Law.

2. (*a*) That all the essential requirements of the Mortgage Law were observed in the foreclosure proceedings brought by Lothrop.

(*b*) That all informalities, if any, in the mortgage foreclosure proceedings and all objections based upon alleged irregularities and omissions in the conduct of such proceedings were waived when Alvarado, the grantee of appellant and the holder of record title to the mortgaged premises, at the close of the foreclosure proceedings appeared in the suit and formally stated that, "being unable to pay to Mr. Rosaly the sum for which the plantation Semil was sold, and the interest and cost, he joins in the petition made by him that the record of ownership which he, Alvarado, had upon the said property should be cancelled."

3. (*a*) That the appellees are entitled to show that the mortgage interest due in 1904 was not in fact paid, and that the proceeds of the 1904 crop were not applied to such payment at the appellant's own request. In so doing they are not attempting to enforce the oral agreement, but merely refer to it as proof of the request.

(*b*) That there is nothing in the laws of Porto Rico to prevent the appellees proving the oral agreement and relying on it, if necessary.

(*c*) That the appellant is estopped to contend that the proceeds of the 1904 crop ought to have been applied to payment of interest due that year, since the non-application was at his request and for his benefit.

4. (*a*) That this court will not consider appellant's objections to the rulings of the trial court as to the admission or rejection of evidence, because appellant has neither specified the reasons for his objections nor stated what he intended to prove by the evidence which he claims was wrongfully rejected.

(*b*) That in any event no reversible error was committed in the admission or rejection of evidence.

The appellees will in addition rely upon the following equitable considerations applicable to the case at bar:—

5. (*a*) That the unwarranted delay of appellant in bringing this suit for the annulment of the foreclosure proceedings constituted such laches as to justify the refusal of his prayer.

(*b*) That appellant has not paid or offered to pay the mortgage debt on the plantation, and for this further reason his suit was properly dismissed.

III.

THE ARGUMENT.

1 (*a*).

THE CONSTITUTIONALITY OF THE MORTGAGE LAW CANNOT BE QUESTIONED ON THIS APPEAL.

The question of the constitutionality of the Mortgage Law under which the foreclosure proceedings took place was not raised either in the District Court or in the Supreme Court of Porto Rico. (See Plaintiff's Bill of Exceptions filed in the District Court, Record, pp. 46–52; and Opinion of the Supreme Court, Record, pp. 52–57.)

It was raised for the first time in the assignment of errors from the decision of the Supreme Court of Porto Rico.

It is a well-recognized rule that objections not raised

in the lower court should not generally be considered in this court for the first time. If such objections could be considered, there would be no assurance that any litigation would ever end; for, should a judgment be reversed on such an objection and the case be again brought to the Appellate Court, some new objection might then be made, and the same process might be indefinitely repeated. It seems self-apparent that the judgment of a lower court should not be reversed for an error not called to its attention,—for error on a matter on which it did not express its judgment.

The above rule is applied by the Supreme Court of Porto Rico. Speaking of another alleged error in the present case, the Supreme Court of Porto Rico said,—

> "Furthermore, although this discrepancy was made an assignment of error, in the appellant's brief, such error was not put in issue by the pleadings, nor was it raised in the court below and it cannot be raised for the first time in the Appellate Court" (Record, p. 52).

As the present question of the constitutionality of the Mortgage Law was not raised in the District Court, the Supreme Court of Porto Rico, following the above rule, would not have considered the question on appeal to it. Therefore, if the Supreme Court of the United States should consider this question, it would pass upon a question which was not passed upon by the Supreme Court of Porto Rico, and which that court would doubtless have thought could not be properly raised for its consideration.

In *Walker* v. *Sauvinet*, 92 U. S. 90, 93, Mr. Chief Justice Waite said,—

> "The other questions presented by the assignment of errors and argued here cannot be considered, as the record does not show that they were brought to the attention of either of the courts below."

In *Robinson & Co.* v. *Belt*, 187 U. S. 41, 50, Mr. Justice Brown said:—

> "No objection seems to have been raised in that court to the form of the judgment. In the assignments of error in the United States Court of Appeals for the Eighth Circuit no such question is raised and none alluded to in the opinion. Such objections could not be raised for the first time in this court. *Insurance Company* v. *Mordecai*, 22 How. 111, 117; *National Bank* v. *Commonwealth*, 9 Wall. 353; *Wheeler* v. *Sedgwick*, 94 U. S. 1; *Wilson* v. *McNamee*, 102 U. S. 572; *Edwards* v. *Elliott*, 21 Wall. 532; *Clark* v. *Fredericks*, 105 U. S. 4.
>
> While it is the duty of this court to review the action of subordinate courts, justice to those courts requires that their alleged errors should be called directly to their attention, and that their action should not be reversed upon questions which the astuteness of counsel in this court has evolved from the record. It is not the province of this court to retry these cases *de novo*."

The State courts have frequently held that the constitutionality of a statute cannot be questioned for the first time on appeal.

Miller v. *Thorpe*, 4 Colo. App. 559.
Chiniquy v. *People*, 78 Ill. 570.
Hopper v. *Chi., etc., R. Co.*, 91 Ia. 639.
Gagnet v. *New Orleans*, 23 La. Ann. 207.
Baldwin v. *Fries*, 103 Mo. 286.
Purdy v. *Erie R. Co.*, 162 N. Y. 42.

1 (*b*).

THE MORTGAGE LAW OF PORTO RICO IS VALID AND CONSTITUTIONAL.

The appellant contends that the Mortgage Law of Porto Rico enacted in 1893, prior to the acquisition of Porto Rico by the United States, and under which the foreclosure proceedings took place, is unconstitutional in that it deprives mortgagors of their property without due process of law (Plaintiff's Brief, p. 9). The appellant in his brief has referred to only a portion of the provisions in this law relating to foreclosure.

PROVISIONS OF THE MORTGAGE LAW OF 1893.

The method of foreclosing mortgages is provided for in the Mortgage Law, Articles 128–134 (War Department Translation, 1899), and in the General Regulations for the Execution of the Mortgage Law, Articles 160–176 (War Department Translation, 1899). The mortgagee bringing foreclosure proceedings must present to the judge of the proper court the instrument on which his claim is based, a certificate of the Register of Property declaring that the mortgage does not appear cancelled in the registry, and a statement of the net amount of the claim and of the exact amounts collected by way of interest or principal. This statement must be authorized by the signature of a lawyer, and the mortgagee agrees by instituting the proceedings to indemnify any loss or damage caused the mortgagor or third persons by malice or negligence in the true statement of facts (Regulations, Art. 169). If the judge who examines the petition and the documents on which it is based considers

them proper, he issues a decree notifying the mortgagor to make payment of the sum due within thirty days (Regulations, Art. 170). There are elaborate provisions for serving such notice on the mortgagor, or, if he is not within the municipal district, then on the person in charge of the estate, so that he may communicate it to the owner (Regulations, Art. 171). If the amount demanded is not paid within thirty days, the judge shall order that the mortgaged property be sold at public auction within the period of twenty days after notices have been given of such sale (Regulations, Art. 172).

Such sale cannot be stayed by means of proceedings in the nature of a demurrer, nor by any other proceedings at the instance of the debtor or by any other person presenting himself as an interested party except in the following cases:—

First. If documentary proofs are brought forward as to the existence of a criminal proceeding on account of the forgery of the mortgage instrument.

Second. If a third person enters a claim of ownership, accompanied by his title to the estate in question recorded in his favor prior to the entry of the debt of the claimant.

Third. If the certificate of a registrar is presented, stating that the mortgage is cancelled, or an authenticated copy of a public instrument cancelling the same, with a note of presentation in one of the registries (Regulations, Art. 175).

If the mortgagor desires to set up any defences other than those enumerated, he must set them up in what is nominally a collateral proceeding, or declaratory suit, which shall not stay the summary sale of the property. For his protection, however, he may demand that the

effectiveness of any final judgment in the suit be secured by the retention of the whole or of a part of the amount which would otherwise be delivered to the claimant in the summary proceedings (Regulations, Art. 175). He may further, as in every suit for the ownership of real property, or for the creation, declaration, modification, or extinction of any property right, demand that a cautionary notice be recorded in the registry (Mortgage Law, Art. 42). If such cautionary notice is recorded, the property or property rights which he claims must be conveyed without prejudice to his rights (Mortgage Law, Art. 71).

It, therefore, appears that the Mortgage Law provides in case of foreclosure:—

(1) For a careful examination by the court of the documents and evidence showing that the mortgagee is entitled to foreclosure; and further, that the mortgagee shall be liable for any mistakes or misstatements.

(2) That an order be served on the mortgagor requesting him to make payment.

(3) For summary sale of the property if payment is not made unless proceedings charging forgery are instituted or a third person claims title or the registry shows payment of the mortgage.

(4) That any other claims may be set up by the mortgagor in a declaratory suit and the proceeds of sale retained until the determination of such suit.

(5) That a cautionary notice may be entered in the registry by the mortgagor if he brings such a collateral declaratory suit claiming any rights in the property, in which case the property shall be sold only subject to his rights as finally determined.

PURPOSE OF THE MORTGAGE LAW OF 1893.

The Mortgage Law of 1893 was promulgated for and especially designed to meet the needs of Cuba, Porto Rico, and the Philippines. These were agricultural countries, devoted principally to the raising of sugar, coffee, and tobacco. A large part of the value of plantations on which such products are raised consists in the growing crops and a continued state of cultivation. If a mortgagor of such a plantation who was in default could stay foreclosure proceedings by setting up any defence which he chose, and during the pendency of such proceedings take off his crops, fail to replant, and let his plantation go to waste, the security of the mortgage would be in large part destroyed. The summary procedure of the Mortgage Law was devised to obviate any such possibility, and so to benefit mortgagors by enabling them more readily to borrow money for the reason that they could, under its provisions, give better security; and to benefit mortgagees by enabling them to realize properly on their security.

The letter of the Colonial Minister to the Cortes, accompanying the Mortgage Law of 1893 (War Department Translation), says:—

> "But where the voice of experience has been heard with the greatest clamor against the law, demanding immediate relief, is where it refers to the procedure for making mortgage debts effective. . . . To furnish land with the capital it needs, and to give the lender assurances of speedy and easy recovery of his loans, is the object of the most important reform proposed by the Government. . . ."

THE MORTGAGE LAW OF 1893 CONTINUED IN FORCE AFTER THE ACQUISITION OF PORTO RICO BY THE UNITED STATES.

The Mortgage Law of 1893 clearly continued in force after the acquisition of Porto Rico by the United States, unless it violated provisions of the Constitution of the United States applicable to Porto Rico.

Laws remain in force until they are changed by some competent legislative authority. They are not changed by a mere change of sovereignty,

> *Commonwealth* v. *Chapman*, 13 Met. 68,

nor are they changed by conquest,

> Lord Mansfield in *Campbell* v. *Hall*, Cowper, 204.

Furthermore, the so-called Foraker Act, approved April 12, 1900, provided:—

> "That the laws and ordinances of Porto Rico now in force shall continue in full force and effect, except as altered, amended or modified hereinafter, or as altered or modified by military orders and decrees in force when this act shall take effect. . . ."
>
> 31 U. S. Statutes at Large, 79.

The Foraker Act, however, was not necessary to continue such laws in force, and, as said by Chief Justice Shaw in *Commonwealth* v. *Chapman*, supra, at p. 72 of a similar provision in the Constitution of Massachusetts,—

> ". . . It was not necessary to preserve all prior laws in force, and was rather declaratory of an existing rule, than the enactment of a new one."

APPELLANT'S CONTENTION.

The appellant apparently contends that the provisions of the Mortgage Law, permitting the court, after an examination of the mortgagee's documents and petition, to order a sale of the mortgaged premises unless the mortgagee pays the amount due or presents a document showing a cancellation of the mortgage or unless criminal proceedings for forgery are instituted, deprive the mortgagee of his property without due process of law, in spite of the fact that the mortgagee can still present all his defences in a declaratory suit, and in a proper case can have the proceeds of sale retained until final judgment, and can ask the court to order recorded a cautionary notice of his claim to the property and thus protect his rights in the property itself. Possibly he may further contend that, as such cautionary notice may be filed only by order of the court, the Mortgage Law does not sufficiently protect him in regard to his claim to this specific property, but might, if the court should refuse to order such cautionary notice recorded, compel him to look to the proceeds of sale.

We submit that the appellant by executing his mortgage when the Mortgage Law was in force agreed to its terms, and, therefore, cannot question the sale as lacking in due process. We further submit that the Mortgage Law fully complies with all the requirements of due process of law, even though we disregard the right of the mortgagor to have a cautionary notice recorded; and furthermore, that, as a law of Porto Rico, which continued after the acquisition of the island as a part of the established local law, it is in any event unobjectionable.

THE LAW WAS IN FORCE WHEN APPELLANT EXECUTED HIS MORTGAGE, AND BY SUCH EXECUTION HE AGREED TO SUBMIT TO THE REMEDY PROVIDED BY THE MORTGAGE LAW; AND, THEREFORE, A SALE UNDER ITS PROVISIONS RAISES NO QUESTION OF DUE PROCESS.

The appellant executed the mortgage in question in 1901 (Record, p. 70). The Mortgage Law had then been in existence for nine years. The appellant, therefore, by executing the mortgage and by inserting no provision that the remedy for enforcement provided in the Mortgage Law should not be applicable, agreed to the provisions of the Mortgage Law to the same extent as though they had been expressly incorporated in the mortgage contract.

Edwards v. *Kearzey*, 96 U. S. 595.
Walker v. *Whitehead*, 16 Wall. 314.

In *Edwards* v. *Kearzey*, supra, at p. 601, this court said:—

> "It is also the settled doctrine of this court, that the laws which subsist at the time and place of making a contract enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. *This rule embraces alike those which affect its validity, construction, discharge and enforcement.*" (Italics ours.)

If the appellant must be taken to have agreed that the remedy provided by the Mortgage Law might be applied, its application could not be held to deprive him of his property without due process of law; for the con-

stitutional guaranty of due process has never been held to prevent the owner of property from making any agreement he wishes as to its disposition.

In *Jones* v. *Great Southern Fireproof Hotel Co.*, 86 Fed. 370, a lien law giving a sub-contractor who had no direct contract with the owner of the land a lien for materials was held constitutional. Its constitutionality was questioned not under the Federal Constitution, it is true, but under the Constitution of Ohio. But, as Judge Lurton (now Mr. Justice Lurton) pointed out (p. 376):—

> "The 'rights' supposed to be violated are rights deemed fundamental under all forms of popular and constitutional government, and like declarations are to be found in all or most of our state constitutions. The question is, therefore, one of general law, having as much reference to the constitution of any other state as to that of Ohio."

Referring to the contention that the enforcement of such a lien might impair the obligation of a contract or be lacking in due process of law, Judge Lurton said (pp. 387–388):—

> "If the law be subject to no other objections, it impairs no contract, for all thereafter made are entered into upon the basis of the law. 'The inhibition of the constitution is wholly prospective. The states may legislate as to contracts thereafter made as they see fit. It is only those in existence when the hostile law is passed that are protected from its effect.' *Edwards* v. *Kearzey*, 96 U. S. 595; *Greenwood* v. *Freight Co.*, 105 U. S. 13; *Denny* v. *Bennett*, 128 U. S. 489, 9 Sup. Ct. 134; *Smith* v. *Parsons*, 1 Ohio, 236; *Weil* v. *State*, 46 Ohio St. 450, 21 N. E. 643. Neither can the owner be said to be thereby deprived of his property without due process of law. He has voluntarily made a contract with the law before him. He has thereby subjected his property

> to liability for certain debts of the contractor. His own voluntary consent is an element in the transaction. He knows what the law is, and makes a contract under that law. It is idle to say that under such circumstances he is deprived of his property without due process of law. *Provident Institution for Savings* v. *Jersey City*, 113 U. S. 506–514, 5 Sup. Ct. 612."

The judgment of the court was affirmed and the reasoning of Judge Lurton expressly approved by this court in *Great Southern Fireproof Hotel Co.* v. *Jones*, 193 U. S. 532.

In *Provident Institution* v. *Jersey City*, 113 U. S. 506, the law provided that charges for water rates should constitute a lien superior to the lien of any mortgages. This was held due process of law with respect to a mortgage executed after the law went into effect, regardless of whether such rates ranked as taxes.

The court said (p. 515):—

> "When the complainant took its mortgages, it knew what the law was: it knew that, by the law, if the mortgaged lot should be supplied with Passaic water by the city authorities, the rent of that water, as regulated and exacted by them, would be a first lien on the lot. It chose to take its mortgages subject to this law; and it is idle to contend that a postponement of its lien to that of the water rents, whether after accruing or not, is a deprivation of its property without due process of law. Its own voluntary act, its own consent, is an element in the transaction."

In *Orient Insurance Co.* v. *Daggs*, 172 U. S. 557, this court, in holding constitutional a law of Missouri which provided that in any suit on a fire insurance policy where a total loss had occurred the measure of damages should

be the amount for which the property was insured, said (p. 566):

> "It is one thing to attribute effect to the convention of parties entered into under the admonition of the law, and another thing to give to circumstances, maybe accidental, conclusive presumption and proof to establish and force a result against property or liberty."

See also *Beall* v. *New Mexico*, 16 Wall. 535.

Under these decisions it is clear that a sale of the mortgaged premises under the Mortgage Law of Porto Rico could not deprive a mortgagor, who voluntarily executed his mortgage with this law in force, of his property without due process of law. The only possible question open to such a mortgagor would be whether such a law as applied to future mortgages would improperly restrict the liberty of contract.

The Mortgage Law, as has been stated above, was devised for the benefit of both mortgagors and mortgagees; it was adapted to facilitate loans; it has been in existence with apparent satisfaction to those subject to it for a number of years, as is shown by the fact that, although the legislature of Porto Rico has had authority to amend it ever since the passage of the Foraker Act in 1901, its terms have not been changed so far as the particular provisions in question are concerned. All of which considerations are persuasive as to the innate reasonableness of its restrictions.

Restrictions such as the present upon contracts creating liens upon real estate are fully justified, and will find many analogies in the legislation of our states. It is recognized that states have great latitude in regulation of such matters.

In *Otis* v. *Parker*, 187 U. S. 606, a provision in the Constitution of California that all sales on margin or for delivery at a future day should be void was held constitutional.

In *Knoxville Iron Co.* v. *Harbison*, 183 U. S. 13, a law requiring redemption in cash of store orders or other evidences of indebtedness issued by employers in payment of wages was held constitutional.

Nearly all our states require the recording of deeds and mortgages to give them validity against third persons, and many of our states restrict the right of interest on loans, prohibit assignments of wages, regulate the foreclosure of mortgages and pledges, and grant liens on land to sub-contractors who have no direct contract with the owner of the land.

The question whether mortgage contracts can be regulated as they are by the Mortgage Law is, then, not open to the appellant in this case, as he contracted under the Mortgage Law, and did not attempt to provide that it should not be applicable. Therefore, under the authorities cited in this section, he must be deemed to have accepted its provisions as fully as if he had consented to its incorporation in the original mortgage contract.

APART FROM THE FACT THAT THE APPELLANT ASSENTED TO THE PROVISIONS OF THE MORTGAGE LAW, IT FULFILLED ALL THE REQUIREMENTS OF DUE PROCESS.

Due process of law is that kind of procedure which is suitable and proper to the nature of a case and is sanctioned by the established customs and usages of the courts.

Ex parte Wall, 107 U. S. 265.

Ordinarily, due process requires that a man's property shall not be taken from him without notice and an opportunity to defend. It does not, however, require any particular form of procedure.

Louisville & Nashville R.R. Co. v. *Schmidt*, 177 U. S. 230.

And due process does not even require notice and an opportunity to defend, if custom or the nature of the case do not demand it.

Murray v. *Hoboken Co.*, 18 How. 272.

In the present case there is no question but that the Mortgage Law required proper notice to be given the mortgagor. There is also no question but that the mortgagor was given full opportunity to offer any defences he wished by filing a declaratory suit. The mere fact that a sale of the mortgaged premises might take place if the court were satisfied by the mortgagee's petition that he had a proper case, and if the defendant

could present no document showing a cancellation of the mortgage, did not constitute lack of due process. If the mortgagee had a defence other than the fact that the mortgage had been cancelled, he could have the proceeds of the sale of the property retained, he could recover them if he finally succeeded in his declaratory suit, and he could have a cautionary notice of his claim recorded and thus protect his interest in the property. Even if the court refused to order such a cautionary notice to be recorded, his right to be heard and to recover the proceeds of the sale of the property and to maintain his claim for damages against the mortgagee, if the mortgagee made any misstatements of fact, would afford him sufficient protection to constitute due process.

The equity practice recognized in this country may produce a not dissimilar result. A mortgagee, or, in a proper case, a creditor, may have a receiver of the debtor's property appointed and the property thus taken out of the debtor's hands, where the property is likely to be wasted or deteriorated, and it would be within the authority of the court to order such property sold by the receiver before the final determination of the litigation if the circumstances justified it.

We do not understand that the appellant denies that under the Mortgage Law a mortgagor has the right to make any defence he chooses in a declaratory suit or in a separate suit and to ask that his interest in the specific property or in the proceeds of the property be protected. *He cannot make this contention, for in the present suit he has set up not only every defence he can invent to show that Lothrop had no right to foreclose, but also all irregularities which he claims were committed in the course of the foreclosure proceedings, and he has asked that the*

mortgaged premises be reconveyed to him because of these defences and irregularities. The court has not refused to hear these contentions, on the ground that the Mortgage Law provides for an absolute sale of the property, whether or not they exist. It has heard all his proofs and contentions, and decided that they are without merit, or that he has failed to prove them, or that he has waived his rights.

EVEN IF THE MORTGAGE LAW OF PORTO RICO WOULD BE UNCONSTITUTIONAL IF ADOPTED BY A STATE, THE CONSTITUTION OF THE UNITED STATES DID NOT PREVENT THE CONTINUANCE IN FORCE OF THIS LAW IN PORTO RICO.

A majority of the court in *Downes* v. *Bidwell*, 182 U. S. 244, expressed the opinion that the Constitution might and did apply to Porto Rico in certain fundamentals. Admitting this to be so, the Mortgage Law of Porto Rico, which was in force at the time the United States acquired Porto Rico, did not so violate any fundamental right as to require this court to hold that it was repealed by the mere acquisition of Porto Rico and the simultaneous application of the Constitution of the United States to that island.

Even if such procedure would not constitute due process of law in one of the states of the United States which recognizes the established usages and customs in force in this country at the date of the original adoption of the Constitution, it is respectfully submitted that it would, nevertheless, constitute due process of law in Porto Rico. The question of what constitutes due process of

law is largely an historical one, and narrows down to the question of what was the law of the land when the Constitution became applicable. As applied to Porto Rico, established customs and usages not completely subversive of justice may well be held due process, even if they would not be so held if adopted in one of our states. It is unquestioned that the present Mortgage Law was in force at the time when the United States acquired Porto Rico, and that it was deemed adapted to the needs of the people, and not oppressive or in violation of any fundamental rights. It should, therefore, clearly be deemed due process.

There can be no doubt that Congress did not believe that this law had been repealed or intend that it should be, or it would have been its duty at once to provide a new law covering the subject.

In *Downes* v. *Bidwell*, supra, at p. 287, Mr. Justice Brown said:—

> "If those possessions are inhabited by alien races, differing from us in religion, customs, laws, methods of taxation and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible; and the question at once arises whether large concessions ought not to be made for a time, that ultimately, our own theories may be carried out, and the blessings of a free Government under the Constitution extended to them. We decline to hold that there is anything in the Constitution to forbid such action."

In *Hawaii* v. *Mankichi*, 190 U. S. 197, it was held that, in spite of the Newlands Resolution annexing Hawaii, which provided that the municipal legislation of Hawaii not "contrary to the Constitution of the

United States" should remain in force, the procedure in criminal cases provided for by the Fifth and Sixth Amendments to the Constitution was not essential in Hawaii. Mr. Justice Brown, after saying that Congress doubtless did not intend to abolish the existing criminal procedure in Hawaii, said (pp. 217–218):—

> "We would even go farther, and say that most, if not all, the privileges and immunities contained in the bill of rights of the Constitution were intended to apply from the moment of annexation; but we place our decision of this case upon the ground that the two rights alleged to be violated in this case are not fundamental in their nature, but concern merely a method of procedure which sixty years of practice had shown to be suited to the conditions of the islands, and well calculated to conserve the rights of their citizens to their lives, their property and their well-being."

In the present case we submit that Congress did not intend that the Mortgage Law should be abolished and the Constitution of the United States did not require it.

It is perhaps not necessary to point out the serious consequences which would result if the Mortgage Law were now held unconstitutional. All titles acquired in foreclosure proceedings for the past thirteen years would be upset, present mortgagees would be unable to foreclose, and it would be difficult to predict the confusion and loss to individuals. The length of time during which the Mortgage Law has been generally accepted, and the extent of the rights which have become vested in reliance on it, are of themselves strong arguments in favor of its constitutionality, for they constitute in substance a decision by those best qualified to decide that the Mortgage Law was and is the "law of the land" so far as Porto Rico is concerned.

1 (*c*).

THE APPELLANT IS ESTOPPED TO OBJECT TO THE CONSTITUTIONALITY OF THE MORTGAGE LAW.

The appellant sold the property in question to one Alvarado on the day foreclosure proceedings were instituted. Alvarado later, while holder of title appeared in court and consented that his ownership be cancelled (Record, pp. 74–75). He and his principal or privy, the appellant, are, therefore, estopped from objecting to the constitutionality of the law under which the proceedings to which Alvarado consented took place.

It has been pointed out in an earlier part of this brief (*ante*, pp. 18–22) that the consent of the appellant to the provisions of the Mortgage Law would be implied from the fact that the Mortgage Law was in force at the time that he executed his mortgage in favor of Lothrop. Alvarado's subsequent concurrence in the proceedings was expressly a ratification of them. When subsequent ratification of a proceeding is joined with prior consent to it, and when the other party has acted in reliance on the validity of that proceeding, will the consenting party be heard in disaffirmance of it?

2 (*a*).

ALL THE ESSENTIAL REQUIREMENTS OF THE MORTGAGE LAW WERE OBSERVED IN THE FORECLOSURE PROCEEDINGS.

Neither a mortgage foreclosure sale nor a judicial sale of any sort will be set aside for immaterial irregularities or omissions where the complainant's rights have not been prejudiced.

Section 142 of the Code of Civil Procedure of Porto Rico contains a statutory declaration of this principle which covers the judicial sale held in the present foreclosure proceedings:—

> "The court must, in every state of an action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect."

In *Stockmeyer* v. *Tobin*, 139 U. S. 176, this court refused to set aside a judicial sale held in the State of Louisiana, and used the following language (pp. 196–197):—

> "Under such circumstances, it not appearing that any real injury has been done to the plaintiff, the sale should not be disturbed because of omissions or informalities that did not affect the substantial rights of the party complaining. In *Copeland* v. *Labatut*, 6 La. Ann. 61, the court said: 'The petition contains no allegation and the record no proof of any injury having been sustained by the plaintiff, in consequence of the informalities alleged; and no offer on the part of the plaintiff to warrant that

> the property, if resold, would bring a higher price than it did before. Under the rule which we have found it necessary to adopt, those omissions would prevent us from disturbing the judgment, even if the informalities were much more material than they actually are.' So, also, in *Mullen* v. *Harding*, 12 La. Ann. 271–2: 'Unless the plaintiffs can show that they have suffered injury by the informalities complained of, they ought not to be permitted to attack the validity of the proceedings.'"

See also *Nalle* v. *Young*, 160 U. S. 624.

CONTENTION THAT THERE WAS NO JURISDICTION OVER THE DEFENDANT TORRES ZAYAS IN THE FORECLOSURE PROCEEDINGS.

The appellant, Torres Zayas, contends that the District Court of Porto Rico did not acquire jurisdiction over him, as he was not properly summoned in the mortgage foreclosure proceedings.

In mortgage foreclosure proceedings under the Mortgage Law the mortgagor first presents his petition to the court. The court, if satisfied with the correctness of the petition and the documents accompanying the same, issues a decree or order summoning the owner of the mortgaged property to pay, and stating that otherwise a public sale of the mortgaged premises will be held (Art. 170, General Regulations for the Execution of the Mortgage Law, War Department Translation, 1899). Provision is also made in special cases as to the persons on whom such summons should be served (Art. 171, General Regulations for the Execution of the Mortgage Law). This summons constitutes service on the defendant in mortgage foreclosure proceedings. The order of the

court providing for the requirement of payment recites the fundamental facts, and this order is communicated to the defendant when the requirement is made.

The findings of fact show that such summons was served on the defendant, Torres Zayas (Record, p. 72). The requirement of payment was a proper summons, and fully complied with the law. It was not necessary to serve him with any other citation or any copy of the complaint.

The old Code of Civil Procedure, in force at the time these foreclosure proceedings were brought, provided as follows (Art. 275):—

> "ARTICLE 275: The requirements will be effected by communicating to the party upon whom the demand is made, in the form provided, the decree in which said demand is ordered, the clerk expressing in the corresponding document that the requirement (demand) ordered in said decree, has been made upon the party."

To this objection of the appellant's the Supreme Court of Porto Rico said (Record, p. 54):—

> "The proceeding had been begun before the Code of Civil Procedure went into effect, and there is nothing to show that the citation (requirimiento) was not in the due form required by the Mortgage Law."

But even if the summons had not been properly served, the appearance of Alvarado, the assignee of Torres Zayas, in the foreclosure proceedings and his consent on September 29, 1905, that his title should be cancelled of record, gave the court full jurisdiction (Record, p. 74).

Alvarado at this time was the proper person to be represented in the proceedings, since he was the holder of

the record title. The last paragraph of Article 175 of the General Regulations for the Execution of the Mortgage Law provides as follows:—

> "If, during the course of the proceedings the estate or some of the mortgaged estates pass into the hands of another owner, the latter, proving the record of his title, may demand that the decrees filed in the clerk's office be presented to him, and the judge shall consent thereto without stopping the course of the proceedings, subsequent proceedings being addressed to him as subrogated to the principal."

CONTENTION THAT THE MORTGAGE NOTES WERE NOT PROPERLY PRESENTED.

The appellant contends that the mortgage notes were not presented to the court with the petition for foreclosure. They were presented in the present suit cancelled (Record, pp. 71, 54).

Paragraph Second of Article 169 of the General Regulations for the Execution of the Mortgage Law requires that there be presented with the first document in the proceedings the instrument or instruments of the credit. This requirement was satisfied by presenting the mortgage contract itself without the notes (Record, p. 72).

Furthermore, Lothrop, in any event, held the mortgage in trust for the note holders (Record, p. 71). In such a case the holders of such notes are not necessary parties to a suit to foreclose the mortgage, and it would, therefore, clearly not be essential to present their notes in order to foreclose.

Cintron v. *Banco Territorial*, 9 P. R. 220.

As to this alleged omission, the Supreme Court of Porto Rico in its opinion said (Record, p. 54):

> "There does not appear to be anything in the Mortgage Law which requires the notes to be presented at the beginning of the mortgage proceeding. DeFord & Co. were acting as trustee for the holders of the notes and the said notes were returned to them. There was no danger of the defendants being sued by other persons because in the present suit the notes were delivered up cancelled. . . . It does not appear, furthermore, that the notes were not in the hands of DeFord & Co. when the proceeding was initiated."

It may further be added that, if the Mortgage Law does provide for the presentation of the notes themselves, it is only to satisfy the court that the order of payment should issue as provided in Article 170 of the General Regulations for the Execution of the Mortgage Law. If the court is satisfied by the papers presented, the requirements of the Mortgage Law are fulfilled.

Furthermore, if presentation of the notes is required, an omission to do so, when it appears that the notes have since been cancelled, cannot have injured the mortgagee and clearly would not justify holding the proceedings invalid.

CONTENTION THAT NO REQUIREMENT FOR PAYMENT WAS MADE UPON THE WIFE OF THE APPELLANT.

It is alleged as an irregularity that no requirement for payment was made upon the wife of Torres Zayas. As was pointed out in the opinion of the Supreme Court of Porto Rico (Record, p. 54), a wife is not a necessary

party to a suit concerning the conjugal property, the husband being the administrator thereof,—Sections 161 and 1327 of the Civil Code being cited in support of this proposition.

In *Porto Rican Leaf Tobacco Co.* v. *Ereno*, 16 P. R. 96, it was held that the wife is not a necessary party to a suit to foreclose a mortgage of conjugal property, since the husband is the legal representative of the conjugal partnership.

A further answer to this objection is that the appellant's wife is not a complainant in the present proceeding. He alone brings this suit, and he was a party to the foreclosure proceedings, so that he cannot complain.

CONTENTION THAT TWO OF THE ORDERS IN THE FORECLOSURE PROCEEDING WERE SIGNED ONLY BY TWO JUDGES.

An order requiring the debtor to pay, in accordance with Article 170 of the General Regulations for the Execution of the Mortgage Law, was made on May 3, 1904.

The court at this time consisted of three judges, and the order was signed by two of the regular judges and by one H. S. Belaval.

On June 16, 1904, the sale at public auction was ordered signed by two judges.

General Orders, 1899, No. 118, permit the appointment of a substitute judge; and, as the secretary certified that the order of May 3, 1904, was signed by three judges, it is apparent that Belaval was a substitute judge. It certainly does not appear to the contrary (see Opinion of Supreme Court of Porto Rico, Record, p. 55).

The order of June 16, 1904, was a mere formal order following the failure of the appellant to pay in accordance with the preceding order. Even if signed only by the instructing judge, it would have been valid.

The appellant contends that, as three judges constituted the court, all three must take part in any trial or vote. Even if we conceded this to be true (which we do not), it does not follow that all three must sign every order. It does not appear in the present case that all three judges did not sit to decide upon each of the orders. The findings of fact merely recite how the orders were signed. It would clearly be sufficient for a majority of the judges to sign an order which all of the judges voted or determined upon.

After July 1, 1904, the court of three judges was abolished, and the court was composed of a single judge, so that the above contention cannot apply to any orders made after that date.

CONTENTION THAT NOTICE OF SALE DID NOT CONTAIN THE VALUATION GIVEN THE PROPERTY.

The fact that the published notice of the sale did not contain the valuation of the property cannot have injured the appellant. The Mortgage Law provides that at the mortgage sale not less than two-thirds of this valuation shall be accepted. In the present case the plantation was valued at $40,000, and it was sold for an amount far in excess of two-thirds of this value; in fact, for an amount in excess of the total valuation, for the price included the mortgage debt of $37,000, interest due and to become due, and a cash payment of $500, plus the costs of the proceedings.

CONTENTION THAT THERE WAS ONLY ONE PUBLIC SALE, AND THAT THE SALE TOOK PLACE WITHIN EIGHTEEN DAYS.

These objections were not assigned as errors to the judgment of the Supreme Court.

Only one sale was required, as the property brought more than two-thirds of its valuation (General Regulations for the Execution of the Mortgage Law, Art. 172).

The findings of fact do not show that the sale took place within eighteen days, and the Supreme Court of Porto Rico held that the proper time, namely, twenty days from the giving of the notices, had elapsed at the time the sale occurred (Record, p. 55).

2 (*b*).

ALL IRREGULARITIES OR OMISSIONS, IF ANY, IN THE COURSE OF THE MORTGAGE PROCEEDINGS, AND ALL OTHER OBJECTIONS TO THE SALE OF THE MORTGAGED PREMISES, WERE WAIVED BY THE APPELLANT'S ASSIGNEE, ALVARADO.

As has been stated, the appellant, on the very day foreclosure proceedings were instituted by Lothrop, viz., April 25, 1904, transferred title to the mortgaged premises to one Alvarado (Record, p. 73). Alvarado on June 3, 1904, brought suit in the District Court of Ponce against Lothrop, praying for a declaration of nullity of the foreclosure proceedings; and he also moved that

the auction sale be stayed. On August 5, 1904, the court entered the following order in this proceeding, viz.:—

> "The court orders the dismissal of this case because it has been twice set for hearing and counsel has failed to appear to-day" (Record, p. 75).

On September 5, 1905, an order was made by the court in the foreclosure proceedings whereby Alvarado was summoned to make payment of the price of the sale of the mortgaged premises, being warned that, if he failed so to do, a writ would issue to the Registrar of Property for the cancellation of his registration of ownership in said property. Thereupon Alvarado made the following statement in court (Record, pp. 74-75):—

> "In the District Court for the Judicial District of Ponce, P. R.—To the Hon. José Tous Soto,—Now comes before Your Honor Alejandro Alvarado, of age and a resident of Juana Diaz and states: that under date of the 16th of September, a requirement was made to him by order of this Court, to pay over to Don Pedro Juan Rosaly, within the following ten days, the sum which the latter had in his turn paid for the property Semil, at the auction sale of said property which was had by virtue of a foreclosure proceeding instituted by Mr. William Sturgis Hooper Lothrop against Don Marcelino Torres y Zayas, the said Alvarado having been warned that in case he should fail so to do a writ should be issued to the Registrar of Property for the cancellation of the registration of ownership made therein in his favor in regard to said property and to appear before the Court within that time, having previously notified Mr. Rosaly, to show sufficient reasons why he should be excused from obeying the said order. That although he notified within that time, by his counsel Mr. Llorens Torres, an opposition to the petition of Mr. Rosaly, he

abandoned the same later on by failing to appear before the court to sustain the same at the date set for the hearing thereof. *And that as he desires to make known in a clear manner his acquiescence in the motion of the petitioner, he now appears and states: that being unable to pay to Mr. Rosaly the sum for which the plantation Semil was sold, and the interest and cost, he joins in the petition made by him, that the registration of ownership which he, Alvarado, had upon the said property should be cancelled.* Ponce, September 29th, 1905.—(Signed) Alejandro Alvarado.—Sworn to before me this 29th day of September, 1905.—W. V. Robbins, United States Commissioner." (Italics ours.)

On April 25, 1907, Alvarado and the appellant rescinded the deed of sale to Alvarado by a public document. The appellant testified in the present suit that the sale to Alvarado was simulated.

It is evident that on September 29, 1905, Alvarado was the record owner of the property, and entitled, so far as third persons were concerned, to deal with the property as owner. It is expressly provided in Article 175 of the General Regulations for the Execution of the Mortgage Law that a purchaser of mortgaged premises during foreclosure proceedings shall be entitled to be treated as subrogated to the rights of the mortgagor in such proceedings.

If, as the appellant now contends, this sale was simulated, Lothrop did not know of such fact, and was entitled to treat Alvarado as the true owner authorized to deal with and dispose of the property. Moreover, if the sale was simulated, it must have been undertaken for the purpose of hindering and delaying the foreclosure proceedings, and such an attempt should never be aided by a court in any way. Finally, as Alvarado brought

suit to cancel such proceedings in June, 1904, he was clearly authorized by the appellant to represent him with reference to the property, and must therefore, in any event, be treated as the authorized agent of the appellant.

Alvarado, then, being authorized, so far as Lothrop and Rosaly were concerned, to deal with the mortgaged premises as owner, expressly appeared in the foreclosure proceedings, withdrew his dissent to the petition that his ownership of the property be cancelled, and joined in the petition that such ownership be cancelled. His ownership was thereupon cancelled, the deed of the property to Rosaly was executed and possession was taken thereunder, the original mortgage notes were paid, and the original mortgage cancelled of record.

By this conduct Alvarado waived all claims that the foreclosure proceedings were irregular and all other objections he may have had to such proceedings. Upon his own petition his title was cancelled, so that the foreclosure proceedings could be consummated by the giving of a good deed to the property. He is estopped now to deny that the proceedings consummated as the result of his request were invalid, especially as it is not contended that he was ignorant at the time he requested such action of the irregularities he now attempts to set up. If Alvarado is estopped, his principal and privy in title, the appellant, must be equally estopped.

The appellant contends that Alvarado's assent was forced, as Alvarado did not have the money to pay the price for which the land sold. This is not the fact. If the mortgage proceedings were irregular, Alvarado could have set this up, as he at first actually did, as a reason why he should neither pay the price of the sale

of the mortgaged property nor have his title cancelled of record. He could, in the alternative, have failed to appear. By appearing and actively requesting that the petition be granted, he waived his objections to the foreclosure proceedings which had already taken place; and he and his privy, the appellant, are certainly estopped after two years to contend that such proceedings were void.

In *Halliday* v. *Stuart*, 151 U. S. 229, certain land, pending appeal, was sold under order of the court with the consent of the attorneys for the parties. This sale was later set aside by the court without notice to the purchaser, and the land was again sold. This court said (p. 238):—

> "When appellees present a decree of sale under which they purchased the lands, and, in virtue of that decree and the sale had under it, claim the lands, Halliday may well say, 'Whatever may be the rights of Craig's estate in respect to the lands, and whatever may be your right to the proceeds of the sale at which I purchased, you cannot claim the lands, purchased by me under a former decree, which sale occurred with your consent, and which purchase was confirmed and a deed made to me without objection from you.' And this position is consistent with the principles of equity."

3.

INTEREST DUE ON THE MORTGAGE IN 1904 WAS NOT PAID, AND THE APPELLEES WERE ENTITLED TO SHOW THIS FACT.

The mortgage contract provided in clause 9th that all the proceeds of the mortgaged premises should be delivered to Messrs. De Ford & Company, to be sold by them, they to deduct from the proceeds the amount of the interest to be paid annually to the creditors (Record, pp. 70, 71). It was later arranged by an oral agreement that from the value of the products the appellant's current expenses should be paid before the payment of interest (Record, pp. 71, 56). In 1904 the value of the coffee delivered to Messrs. De Ford & Company exceeded the interest due that year, but, in accordance with the agreement with the appellant, the latter drew on the proceeds to meet the current expenses and did not leave sufficient funds to pay the interest for the year 1904 (Record, pp. 71, 72, 56). Accounts of the receipts from the plantation were rendered each month by De Ford & Company to the appellant and also accounts of his debits and credits, and the appellant never questioned the correctness of these accounts (Record, pp. 71, 56).

The appellant contends that, as a statute somewhat similar to our Statute of Frauds exists in Porto Rico, the clause of the original mortgage contract providing that the proceeds of each crop must first be applied to the payment of interest could be changed only by a new

contract in writing embodied in a public instrument. He, therefore, contends that, although the proceeds of the crop of 1904 were not, as a matter of fact, applied to payment of interest, but were applied at his request to other purposes, the agreement under which they were so applied to other purposes was unenforceable; and it must therefore be held that such proceeds were applied to payment of interest, or in any event that the appellees are not entitled to show that they were not so applied.

(a)

APPELLEES HAVE NOT ATTEMPTED TO ENFORCE THE ORAL CONTRACT.

The appellant's whole argument rests on the contention that the oral agreement that the proceeds of the crop should be applied to current expenses, and not to payment of interest, was unenforceable. An obvious answer to this argument is that the appellees have not attempted to enforce the oral agreement, and that it is immaterial whether or not it was enforceable.

The appellees relied on the original mortgage contract, and showed that the mortgage was properly foreclosed, because interest was not paid when due. In answer to this the appellant did not contend that interest had actually been paid. He argued that there was a contract which provided that De Ford & Company (who were not even parties to the mortgage contract) should retain and apply to payment of interest the proceeds of the crop of each year; that what De Ford & Company ought to have done must be deemed to have been

done; and that, therefore, the interest must be deemed to have been paid. As the question at issue was whether or not interest had been paid to the mortgagee or noteholders, and not what De Ford & Company ought to have done, the appellees might well have made no reply to this contention. But they did reply to this contention by showing that De Ford & Company did not retain and apply such proceeds to payment of interest because the appellant himself requested the right to use these funds for his current expenses, and that he did so use them. To show his request they offered proof of the oral agreement which embodied his request, and they also showed that in accordance with such agreement he actually obtained the use of these funds. They thus showed conclusively that the appellant, having himself requested that the proceeds of the crop be diverted to other purposes and having used them for such purposes, could not contend that the proceeds should be deemed to have been used for payment of interest.

The purpose, then, of proving the oral agreement was to show the plaintiff's request to De Ford & Company, and his use of the proceeds of the crop in pursuance of such request. Not only did the appellees not attempt to enforce such oral agreement, but it was immaterial whether it constituted an agreement of any kind, whether enforceable or not. Being merely offered in proof to show the plaintiff's request as to the use of the funds, the question of whether or not it constituted an enforceable agreement was clearly immaterial.

The fact that De Ford & Company might have refused to permit Zayas to use the proceeds of the 1904 crop for other purposes does not entitle him to claim that such proceeds must be deemed to have been applied to pay-

ment of interest. If a sales agent who has a contract under which he may retain proceeds of sales to pay his advances at his principal's request waives his right to retain a portion of such proceeds and pays them over to his principal, his principal cannot contend that the agent must be held to have been paid to the extent of the proceeds so turned over to the principal. Nor would the agent thereafter be precluded from enforcing his claim for any unpaid advances by foreclosure of any lien held by him or otherwise. The present case is on all fours with the above-mentioned example.

If the mortgage contract had provided that Zayas himself should apply the proceeds of the crop to payment of interest and he had not in fact done so, even though with the consent of the appellees, it would be clear that he could not contend that interest had been paid. It is difficult to see how he has any better standing to claim that interest was paid because De Ford & Company at one time had sufficient funds to pay this interest, but, instead of retaining such funds and applying them to payment of interest, paid them over to the appellant at his request.

It should be borne in mind that the notes were negotiable, and it appears that they were not owned by De Ford & Company at the time interest became due. Furthermore, Lothrop was the mortgagee, not De Ford & Company. The latter were not parties to the mortgage contract. If interest was not paid on the mortgage notes at Zayas's request (and he surely cannot contend that interest was paid), he cannot contend that, because De Ford & Company could have kept the proceeds in their hands and applied such proceeds to payment of interest, such interest must be deemed to have

been paid so as to deprive the mortgagee and the holders of the mortgage notes of their right to foreclose.

As we have above stated, the question at issue was whether or not the mortgage interest had been paid, and it is clear it had not been paid. The absurdity of the appellant's contention that it must be *deemed to have been paid* is self-evident. Is it possible that, when the mortgagee in 1904 demanded his interest, the appellant could have properly replied, "While as a matter of fact you have not received your interest, yet you must be deemed to have received it, because, if you had not let me at my request apply the proceeds of the crop to my current expenses, you would doubtless have been paid"?

(*b*)

IN ANY EVENT THE APPELLEES WERE ENTITLED TO PROVE THE ORAL AGREEMENT.

Even if this court should hold that the appellees must rely not as they contend on the fact that interest was not paid and that it was not paid because of the conduct of the appellant, shown by his oral agreement, but on the oral agreement itself, they are entitled to do so.

The appellant must object to proof of the oral agreement upon one of two grounds,—(1) either that it was in violation of the parol evidence rule, or (2) that it violated the Statute of Frauds.

It is clear that the parol evidence rule was not violated by the admission of this proof. It was not the purpose of this evidence to vary the terms of the original mortgage contract in any way. The appellants admitted the

existence of the mortgage contract, but then proved that one of its terms had been abrogated by a subsequent agreement. The parol evidence rule does not forbid such proof.

Knickerbocker Life Ins. Co. v. *Norton*, 96 U. S. 234.
Grandin v. *U. S.*, 22 Wall. 496.
R.R. Co. v. *Trimble*, 10 Well. 367.
Teal v. *Bilby*, 123 U. S. 572.

Nor has the objection any greater force, if based upon the Statute of Frauds. Zayas himself caused the proceeds of the 1904 crop to be applied in accordance with the terms of his oral agreement, to purposes other than the payment of interest. Such subsequent oral contract, therefore, was fully performed with his concurrence and knowledge. It is settled that, when an oral contract which is unenforceable by reason of the Statute of Frauds has been fully performed, the rights of the parties are no longer affected by the statute, and it is immaterial that either party might have refused to perform.

Dibb v. *Allen*, 149 U. S. 481.
Reedy v. *Smith*, 42 Cal. 245.
McLure v. *Keen*, 25 Colo. 284.
Stone v. *Dennison*, 13 Pick. 1.

(c)

THE APPELLANT IS ESTOPPED TO CONTEND THAT THE PROCEEDS OF THE 1904 CROP OUGHT TO HAVE BEEN APPLIED TO PAYMENT OF THE INTEREST ON THE MORTGAGE DEBT, SINCE THE APPLICATION OF SUCH PROCEEDS TO OTHER PURPOSES WAS MADE AT HIS REQUEST AND FOR HIS BENEFIT.

It is evident from the facts found that the appellant required additional funds to cultivate and gather the crop from his plantation. If he had not been able to cultivate it he would have certainly been unable to pay the mortgage interest, and foreclosure would have resulted. At his request and for his benefit it was agreed that the proceeds of the crop, instead of being applied to payment of interest, might be used by the appellant for payment of such current expenses. This was done, and the appellant reaped the benefit of the arrangement.

Furthermore, accounts showing such application were rendered monthly to Zayas, and he never questioned the correctness of such accounts until he brought this suit nearly four years later.

It is clear that the application of the proceeds of the 1904 crop to payment of current expenses was the result of the plaintiff's conduct and request and for his benefit. Under these circumstances he is now clearly estopped to contend that the proceeds should not have been so applied, and that, therefore, interest must be deemed to have been paid.

4 (*a*).

THIS COURT WILL NOT CONSIDER THE APPELLANT'S OBJECTIONS TO THE RULINGS OF THE TRIAL COURT AS TO THE ADMISSIBILITY OF EVIDENCE BECAUSE THE APPELLANT NEITHER SPECIFIES THE REASON FOR HIS OBJECTION NOR STATES WHAT HE INTENDED TO PROVE BY THE EVIDENCE CLAIMED TO HAVE BEEN WRONGFULLY REJECTED.

The manner in which the appellant in this case has attempted to bring up alleged errors of the trial court in rulings upon the evidence is open to serious objections. Throughout the assignment of errors upon questions of evidence it is simply stated that a witness was asked a certain question, that this question was objected to, and that the evidence was thereupon either admitted or rejected. Where the plaintiff complains of the rejection of evidence, it is nowhere stated what the rejected evidence was intended to prove nor the specific grounds upon which the question was objected to. The result of this is that the court has absolutely no basis upon which to decide whether or not the rejection of the evidence was proper. Upon appeal the assumption must be that the ruling of the trial court was correct.

In *Camden* v. *Doremus*, 3 How. 515, this court declined to consider objections to the admissibility of evidence which did not state the grounds upon which they were made and which did not point to some definite

and specific defect in the nature of the evidence admitted. It was said (p. 530):—

> "We must consider objections of this character as nugatory, and, if entitled to weight anywhere, certainly as without weight before an Appellate Court."

In *Burton* v. *Driggs*, 20 Wall. 125, the same rule was laid down. At the very outset of the opinion of the court in that case Mr. Justice Swayne said (p. 133):—

> "It is a rule of law that where a party excepts to the admission of testimony he is bound to state his objections specifically, and in a proceeding for error he is confined to the objection so taken. If he assigned no ground of exception the mere objection cannot avail him. In *Hinde's Lessee* v. *Longworth*, this court said 'As a general rule we think the party ought to be confined, in examining the admissibility of evidence, to the specific objection taken to it. The attention of the Court is called to the testimony in that point of view only.' Here the objection was that the copy was not the original. This, as a fact, was self-evident; but as a ground of objection it was wholly inadequate."

In *Noonan* v. *Caledonia Mining Company*, 121 U. S. 393, Mr. Justice Field, in the course of his opinion, said (p. 400):—

> "The objection to the introduction of the articles of incorporation at the trial was that they were 'immaterial, irrelevant, and incompetent' evidence. The specific objection now urged, that they were not sufficiently authenticated to be admitted in evidence, and that the certificates were made by deputy officers, is one which the general objection does not include. Had it been taken at the trial and deemed tenable, it might have been obviated by other proof of the corporate existence of the plaintiff or by new certificates of the articles of in-

> corporation. The rule is universal, that where an objection is so general as not to indicate the specific grounds upon which it was made, it is unavailing on appeal, unless it be of such a character that it could not have been obviated at the trial. The authorities on this point are all one way. Objections to the admission of evidence must be of such a specific character as to indicate distinctly the grounds upon which the party relies, so as to give the other side full opportunity to obviate them at the time, if under any circumstances that can be done. *United States* v. *McMasters*, 4 Wall. 680; *Burton* v. *Driggs*, 20 Wall. 125; *Wood* v. *Weimar*, 104 U. S. 786, 795."

To the same effect are the cases of *Toplitz* v. *Hedden*, 146 U. S. 252; *Choctaw Railway Company* v. *McDade*, 191 U. S. 64. In the last cited case the court laid down the rule as follows (p. 69):—

> "The assignments of error as to the admission of testimony were nearly all based upon exceptions general in their character and under the well-settled rule not reviewable here."

There is another equally well-settled rule of law against which the appellee's assignment of errors as to the rulings on the admissibility of evidence offends. Many of the questions objected to at the trial by the appellant were in themselves admittedly unobjectionable. If any objection could validly have been made, it would have been to the answer made to the question rather than to the question itself. The settled rule in this court is that, if at the trial objection is made to a question which is unobjectionable, inquiry cannot be made as to whether or not the answer to that question was responsive. If the answer was not responsive, the objection should have been to the answer, and not to the question.

Gould v. *Day*, 94 U. S. 405.

4 (*b*).

NO REVERSIBLE ERROR WAS COMMITTED BY THE DISTRICT COURT IN THE ADMISSION OR REJECTION OF EVIDENCE.

It is not apprehended that the court in this case will find it necessary to rest its decision upon any particular ruling of the trial court on matters of evidence. There are so many broad grounds upon which the case may be and should be decided in favor of the appellees that the questions of evidence are immaterial, and it is not expected that the court will find it necessary to consider the questions of evidence involved. Consequently, no exhaustive discussion of the rulings upon the evidence is intended. Indeed, a very brief discussion of the points involved will suffice to show that the rulings of the trial court upon matters of evidence are unassailable.

The first objection of the appellant is based upon the exclusion by the trial court of certain evidence relating to the delivery of coffee during the years 1901, 1902, and 1903. The exact force of this objection it is not possible to see; and, while this may truthfully be said of all the appellee's objections, it is especially and confusingly so in respect to this first. In the first place it is not apparent just what bearing the delivery of coffee during the years 1901, 1902, and 1903 had upon the issues involved in this case. The main issue was whether or not the interest due on the 21st of February, 1904, had been paid. Evidence as to deliveries of coffee in foregoing years was not pertinent to this issue, for such

deliveries were destined for the payment of the interest of the prior years. If we are driven to assume that the evidence excluded was intended to prove that more funds had come into the hands of De Ford & Company than were accounted for, a full opportunity was given to the appellant at a subsequent time in the trial to introduce whatever evidence he desired upon this point. (Opinion of the Supreme Court of Porto Rico, Record, p. 99.) The decision of the trial court that there had been no misappropriation of the income of the years prior to 1904 was upon the ground, among others, that De Ford & Company had rendered regular accounts of the proceeds of the mortgaged property, and that these accounts had never been objected to by appellant until the institution of these proceedings.

The next objection is based upon the exclusion of certain evidence which would have shown the amount of the rents and profits from the mortgaged property from just before the time of the foreclosure sale up to date. The court rightly excluded this evidence under the well-known rule that, where the principal prayer of a suit is denied, the ancillary and auxiliary prayers will also be disallowed.

An objection was based upon the fact that the defendant was allowed to introduce evidence showing that De Ford & Company were trustees for the holders of the notes secured by the mortgage, and so entitled to collect interest thereon and to take any steps necessary to collection. This was done by having Mr. Rosaly explain certain endorsements to De Ford & Company upon the backs of these notes. It should be noted that the terms of the endorsement are perfectly clear and self-explanatory. The questioning of the witness was merely de-

signed to call attention to the terms of the endorsement. It should further be noted that it is always permissible to explain the usages or customs of a trade.

> "Evidence of usage or custom is admissible to explain the true character of an act, contract or document when it cannot be made clear in any other way; but usage is never admissible as evidence except for purposes of interpretation." *Laws of Porto Rico*, 1905, *Law of Evidence*, *Art.* 35, *Part* 10.

It is next objected that the trial court erred in admitting in evidence the books of account of De Ford & Company and of Lothrop, Luce & Company because the same were not kept in the form provided by the Code of Commerce, "inasmuch as the same is not a ledger." Here, again, is an objection which is especially open to the criticism that it leaves us without knowing what the objection is, and much less the grounds for it. Why the books of accounts admitted were not "a ledger" and wherein said books offend against the provisions of the Code of Commerce is not apparent.

The Code of Commerce provides for the keeping of books in Articles 33 to 49 (Title III., Books and Book-keeping of Commerce).

By Article 33 merchants are required to keep:—

(1) A book of inventories and balances.

(2) A day book.

(3) A ledger.

(4) A copying book for letters and telegrams.

(5) Other books required by special laws.

By Article 34 it is provided that such other books as may be considered advisable according to the system of book-keeping adopted may also be kept, and that such books shall not be subject to the provisions of Article 36.

> script or copy by virtue of which the third party has acted."

The subsequent recording of the rescission, on April 20, 1907, of the sale of Torres Zayas to Alvarado is likewise unimportant, for it took place subsequent to Alvarado's appearance in the foreclosure proceedings, and Article 25 of the Mortgage Law provides,—

> "Recorded titles shall be effectual against third parties only from the day of record."

The next assignment of error is based upon the fact that the trial court allowed the gentleman who was judge of the District Court for the judicial district of Ponce to testify that he had issued an order on the 19th of July, 1904, directing that a writ of execution be issued to the marshal to sell the mortgaged property at public auction.

This assignment of error is based upon the assumption that the order of July 19, 1904, constituted a judgment. In point of fact it was not a judgment. The sole object of that order was to resolve the hesitancy of subordinate officers of the court based upon doubts as to just what their duties were under a new law. The office of marshal had been created by the law of March 10, 1904, and that officer did not begin to exercise his functions until the 1st of July, 1904 (Law of March 10, 1904, § 33). Prior to that time the clerk was the officer upon whom the duty of carrying out the orders of the court devolved. Some doubts arose as to whether the order of sale at public auction should be carried into effect by the clerk or by the marshal: hence the order of the court directing the clerk to issue an order of execution to the marshal to carry out the previous orders of May and June. This

order of July 19 was simply an instruction providing for the fulfilment of a previous order, a specification of the manner in which an existing order should be carried out, a statement of the law by the judge for the guidance of his subordinates.

It should be noted that any judgment of the court decreeing a foreclosure could not possibly appear in the Book of Records or in the Book of Judgments, if made prior to July 1, 1904. The new Code of Civil Procedure providing for the keeping of a Book of Records and a Book of Judgments did not go into effect until July 1, 1904. Consequently, neither the order requiring payment (May 3, 1904) nor the first order providing for sale at public auction (June 16, 1904) could appear in the Book of Records or in the Book of Judgments, since said books were not in existence at the time those orders were made. As to the superfluous order of July 19, 1904, that would not appear in the Book of Judgments, because it did not have the character of a judgment: it was, as we have pointed out, simply an explanatory order to aid in the enforcement of a judgment.

It has been decided by the Supreme Court of Porto Rico (*Porto Rico Leaf Tobacco Company* v. *Aldrey*, 13 P. R. 228, at page 233) that it is the order to pay, in this case the order of May 3, 1904, rather than the order to sell, which is the final determination in the summary proceedings of the Mortgage Law. If any of the orders made in the course of the foreclosure proceedings attacked in this suit should appear in the Book of Judgments, it would, then, be the order of May 3, 1904. The Book of Judgments was not in existence on May 3, 1904.

Even if the order were to be regarded as truly a judgment, still no objection to this manner of proving it could have been made under the peculiar circumstances which existed in this case. Although some earlier decisions in a few jurisdictions were to the effect that, where the record of a judgment was lost or destroyed, the judgment could not be proved until the record had been restored by proper proceedings in the court where the judgment was rendered, the weight of authority is in favor of the proposition that, where a judgment is so lost or destroyed, secondary evidence is admissible to establish the fact of the existence of such a judgment and its contents.

Ames v. *Hoy*, 12 Cal. 11.
Stockbridge v. *West Stockbridge*, 12 Mass. 400.
Mandeville v. *Reynolds*, 68 N. Y. 528.

There is no reason for any distinction to be made where, as in this case, the judgment (if such it be) was omitted by mistake or inadvertence from entry in the Book of Judgments. Under the best evidence rule the course pursued in this case was certainly unobjectionable. A judgment has been rendered; no written record of it was in existence; the only persons who could testify to the existence of that judgment, with the single exception of the judge who rendered it, have died: no argument seems necessary to show that the judge in such a case can testify as to the existence of a judgment.

Furthermore, the order of execution issued by the secretary of the District Court of Ponce on the 22d of July, 1904, is proof of the existence of this order, for it expressly recites its rendition.

5 (*a*).

THE DELAY IN BRINGING THIS SUIT CONSTITUTES SUCH LACHES AS TO JUSTIFY ITS DISMISSAL.

It is submitted that the delay of Torres Zayas in bringing this suit is in itself a sufficient ground to justify the refusal of the relief sought and the dismissal of this appeal.

The proceedings by which the mortgage was foreclosed took place in the year 1904. This suit was not instituted until the year 1908.

Applications to set aside judgments, where made after such unreasonable delay on defendant's part as to make him chargeable with laches, are viewed with great disfavor, and will not be granted except upon very strong grounds.

Parish v. *McLeod*, 73 Ga. 123.

In *Harwood* v. *Railroad Co.*, 17 Wall. 78, it was held that five years' delay in filing a bill to set aside a decree of foreclosure and sale of a railroad on the ground of fraud is too much when the plaintiffs were aware of the proceedings as they progressed, and do not allege when they acquired knowledge of the fraud nor satisfactorily explain why it was not sooner obtained. The court said (p. 81):—

> "Without reference to any statute of limitations, the courts have adopted the principle that the delay which will defeat a recovery must depend upon the particular circumstances of each case. This case

> does not show a sufficient degree of diligence to justify the overthrow of a decree of foreclosure, under which new rights and interests must necessarily have arisen."

In *Hall* v. *Jones*, 32 Ill. 38, a suit was brought after a lapse of three years to declare null and void a judgment which had been obtained upon a promissory note. The court, having pointed out that applications to open a judgment, especially where the judgment is one rendered by consent, should be made at the earliest opportunity, and that such applications have but slight claims to favorable consideration after a lapse of three years, went on to say (p. 44):—

> "The confession was in open court, and the judgment was a judicial act done in open court, and it must be presumed the court had sufficient evidence before it to justify the rendition of the judgment. At this late day, after the inexcusable *laches* of the defendant, and the delay unaccounted for, much will be presumed to sustain the judgment of the court."

Applebee's Appeal, 126 Pennsylvania State, 385, is a similar decision. There an attempt was made to open a judgment after a lapse of seven years. It was pointed out that such suits are addressed to the discretion of the court, that the judge to whom such application is made acts as chancellor, and that the appellate court will only look to see if his discretion has been abused.

5 (*b*).

APPELLANT HAS NOT PAID OR OFFERED TO PAY THE MORTGAGE DEBT, AND FOR THIS FURTHER REASON HIS SUIT WAS PROPERLY DISMISSED.

It is a condition precedent to the obtaining of any relief from a court of equity that complainant must have done or offered to do everything that justice and fair dealing demands from him on behalf of the defendant. This principle usually finds expression in the maxim:—

"He who seeks equity must do equity."

People's National Bank v. *Marye*, 191 U. S. 272.
Neblett v. *McFarland*, 92 U. S. 101.
Clarke v. *White*, 12 Pet. 178.

Payments of interest upon the mortgage debt became due in 1904 and 1905; the principal of the mortgage debt became due in 1905. Appellant has not paid or offered to pay either interest or principal. The mortgage has been paid by the appellees and discharged of record, and, if the appellant should recover his land as he requests, he would obtain it without ever paying the mortgage indebtedness.

In *Davis* v. *Gaines*, 104 U. S. 386, an attempt was made to set aside a sale effected under order of court by one purporting to act as executor of the estate. The money obtained from the sale was applied to the extin-

guishment of a mortgage executed by the deceased. It was held that the purchaser, although the sale was irregular or void, could not be ousted of his possession upon a bill in equity filed by the heirs or the devisees unless they repaid or tendered him the purchase money. The court said (p. 403):—

> "Every cent of the purchase money was applied to the extinguishment of the mortgage executed by Clark, and for which his estate was liable. No repayment or tender of this sum or any part of it is averred in the bill. Upon this state of facts, we do not think the complainant is entitled to a decree."

In *McQuiddy* v. *Ware*, 20 Wall. 14, it was held that proceedings for collection of a debt cannot be set aside unless the debtor tenders the amount due before instituting his action.

IV.

ADDENDA.

This brief is filed on behalf of Lothrop, Luce & Co. and the heirs of Pedro Juan Rosaly y Capo. The matters briefly mentioned below have no bearing upon the interests of any of these parties. Counsel deem it their duty, however, as officers of the court, to submit the following considerations for the court's attention.

1.

THE DISTRICT COURT DID NOT ERR IN REFUSING TO ENTER JUDGMENT AGAINST THE DEFENDANT ALICE LOTHROP.

The only service upon the defendant Alice Lothrop was by publication (Record, p. 37), so it is apparent that no personal judgment could be rendered against her. There has never been any attachment of any property of Mrs. Lothrop, in Porto Rico or elsewhere, and so there was no possibility of a judgment *in rem or quasi in rem.* Furthermore, a default in a case of this kind, where service has been only by publication, does not carry with it an adverse judgment. Proof of his right is required on the part of the plaintiff. The mere statement of the provisions of the code of Civil Procedure bearing upon this point is conclusive:—

"CHAPTER II.

JUDGMENT UPON FAILURE TO ANSWER.

SECTION 194—Judgment may be had, if the defendant fail to answer the complainant, as follows:—

. . . . . .

3. In actions where the service of the summons was by publication, the plaintiff, upon the expiration of the time for answering, may, upon proof of the publication, and that no answer has been filed, apply for judgment; *and the court must thereupon require proof to be made of the demand mentioned in the complaint;* and if the defendant be not a resident of the Island, must require the plaintiff, or his agent, to be examined on oath, respecting any payments

that have been made to the plaintiff or to any on for his use on account of such demand, and ma render judgment for the amount which he is entitle to recover." (Italics ours.)

2.

NO SUPERSEDEAS HAS ISSUED ON THIS APPEAL.

No supersedeas bond has been filed in this case (Rec p. 59; U. S. Revised Statutes, Sec. 1000; Rules of th Supreme Court of the United States, No. 29). Becaus of the failure to file such bond, appellees were at liberty to sell the Semil plantation at any time subsequent t the decision of the Supreme Court of Porto Rico. Such a sale by appellees would confer a title upon their grantee which could never be assailed by appellant upon any ground involved in this litigation, for the final judgment of the Supreme Court of Porto Rico was not superseded and as a consequence all the matters decided therein were *res adjudicatae* so long as that judgment stood unreversed. If, by any chance, the judgment of the Supreme Court of Porto Rico should be reversed, rights vested in third parties in reliance on that decision and prior to its reversal are entitled to full protection.

Respectfully submitted,

MALCOLM DONALD,

Of Counsel for Lothrop, Luce & Co., and the Heirs of Pedro Juan Rosaly Capo, Appellees and Defendants in Error.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

No. 17.

TORRES ZAYAS, APPELLANT,

vs.

LOTHROP LUCE & CO ET AL., APPELLEES.

ADDITIONAL AUTHORITIES REQUESTED BY THE COURT FROM COUNSEL FOR APPELLEES.

The question of the exact nature of foreclosure proceedings, under the mortgage law of Porto Rico, has not been decided directly by the Supreme Court of Porto Rico. From the remarks of the court, however, with reference to the mortgage law, it is very evident that the court regards a foreclosure sale as a judicial sale and that such a sale is binding on the owner of the land, even though he does not appear in such proceedings.

Martinez *vs.* Rivera, 6 P. R., 175.

Giminez *vs.* Brenes, 10 P. R., 124.

P. R. Leaf Tobacco Co. *vs.* Aldrey, 14 P. R., p. 228 (see p. 233).

See especially remarks of Judge McLeary (dissenting) in Giminez *vs.* Brenes, *supra,* at page 141.

The sale of the land is a proceeding *in rem.* No personal judgment can be entered unless the debtor appears in the proceedings.

The possessory proceeding to have titles to land recorded in the registry of deeds is quite different in its nature. It is merely designed to enable claimants of land to have their *prima facie* claims recorded in the registry. In article 329, of the Mortgage Law, it is expressly provided that claims so recorded shall be without prejudice to a third person having a better claim.

Respectfully submitted,

MALCOLM DONALD,
Counsel for Appellees.

that the court excluded testimony offered to show that the transfer was fictitious and that he was still the owner and entitled to notice. 16 Porto Rico 172, affirmed.

THE facts, which involve the validity of a sale of real estate in Porto Rico made in judicial proceedings for the foreclosure of a mortgage, are stated in the opinion.

Mr. C. M. Boerman for appellant and plaintiff in error:

This court has jurisdiction on this appeal, as the property claimed and involved is far exceeding the value of $5,000. *Royal Ins. Co.* v. *Martin*, 192 U. S. 149.

The summary proceedings under the mortgage law of Porto Rico are contrary to the provisions of the Constitution of the United States.

There is really no defense to the proceedings on a mortgage under this law. The mortgagor cannot have his day in court. The court virtually does not act as a court, but simply as an executive officer would act. It deprives a man of his property without due process of law.

The general guarantees of life, liberty and property contained in the Constitution of the United States apply to Porto Rico. *Downes* v. *Bidwell*, 182 U. S. 277.

All the laws in force in Porto Rico are so only through the act of Congress which declared them so to be after the change of sovereignty. Article 8, Organic Act of April 12, 1900.

For definitions given by this court to the words "due process of law" see *Hovey* v. *Elliot*, 167 U. S. 409; *Simon* v. *Craft*, 182 U. S. 427. See also *Health Department* v. *Trinity Church*, 17 N. Y. 510, 512; *Stuart* v. *Palmer*, 74 N. Y. 183, 189; *Ieck* v. *Anderson*, 57 California, 251, 253.

The rule of justice which forbids the taking of property except according to the law of the land, means that there shall be no taking, no condemnation, before hearing. *First Nat. Bank* v. *Swan*, 3 Wyoming, 356. See also

People v. *Essex County Supr's*, 70 N. Y. 228, 234; *Wright* v. *Cradlebaught*, 3 Nevada, 341, 349; *State* v. *Cutshall*, 110 N. Car. 538; *Lumbering Co.* v. *Wasco County*, 35 Oregon, 498; *Simmons* v. *West. Un. Tel. Co.*, 63 S. Car. 525; *Bennet* v. *Davis*, 90 Maine, 102; *Babcock* v. *City of Buffalo*, Sheld. 317, 340.

Judicial orders or judgments affecting the life or property of citizens in the absence of notice and opportunity to be heard to the party affected, are violative of the fundamental principles of our laws, and cannot be sustained. *In re Rosser*, 101 Fed. Rep. 562, 567; *Holden* v. *Harvey*, 167 U. S. 366; *Jensen* v. *Union Pac. Ry. Co.*, 6 Utah, 253; *In re Jensen*, 59 N. Y. 653, 655; *San Mateo* v. *So. Pac. Ry. Co.*, 13 Fed. Rep. 722, 752.

The provisions of the mortgage law itself were not complied with in the proceedings to foreclose the mortgage and therefore those proceedings are null and void.

Mr. Malcolm Donald for appellees and defendants in error.

Mr. Chief Justice White delivered the opinion of the court.

The plaintiff in error, Marcelino Torres Zayas, in January, 1908, brought this suit to set aside a sale of real estate, made in judicial proceedings, of a summary or executory character, for the foreclosure of a mortgage and to recover the property with fruits, revenues and damages. The right to the relief sought was based, broadly speaking, upon the following grounds: *a*, the prematurity of the suit to foreclose because there was nothing due when the proceedings were commenced; *b*, the absence of a necessary party; *c*, vices in the proceedings, of such a character as to cause them to be absolutely void. The trial court dismissed the suit. On appeal, the Supreme Court of Porto Rico

affirmed and it is to reverse such judgment that the writ of error and the appeal in this record were prosecuted. Having the power to review only by appeal, (*Garzot* v. *de Rubio*, 209 U. S. 283) the writ of error is dismissed and we consider the case on the appeal.

The court below directed attention to the slovenly and ill arranged record, but despite its admonition nothing seems to have been done to re-arrange the record for the purposes of review by this court. We are not authorized to reëxamine the evidence, but a statement of facts made by the court below, and in a case where there was no such statement our duty would be to affirm because it would be impossible to decide that error had been committed. There is a statement of facts in the record, but it is unsatisfactory in many respects since in matters which are important it is silent where it should speak and in negligible matters speaks with unnecessary prolixity, being confusedly arranged and in important particulars but states evidentiary facts without any attempt to find the ultimate fact properly to be deduced from the stated evidence. We mention these subjects in order to direct the attention of the court below to them and to avoid the making of like statements of fact in the future. As the court delivered a full opinion which throws light on the statement and as in substance our conclusion will be rested upon documents which are uncontroverted and facts which are clearly found by the court below and are undisputed, we come to dispose of the case, giving, as a prelude, a statement which we deem necessary to an understanding of the matters for decision.

Torres owed a debt of $47,000 to W. S. H. Lothrop which Torres had assumed in 1898 on the purchase of certain real estate upon which the debt was secured by a conventional mortgage. The firm of De Ford & Company had acquired this debt from Lothrop, and in February, 1901, gave Torres an extension of four years to

February, 1905, new notes being furnished as evidence of the debt bearing ten per cent. interest payable annually and the notes being secured by a conventional mortgage on two pieces of property belonging to Torres and upon a third piece belonging to a commercial firm who intervened in the act and mortgaged its property to secure the debt of Torres. By the ninth clause of the act of mortgage it was agreed that the crops made by Torres on the property mortgaged by him, should be shipped to De Ford & Company who should sell them, applying the proceeds first to the interest and then to the principal of the debt. The mortgage, while indivisible as between the parties, was as to third persons made divisible, a specific portion of the debt being assigned to each of the three properties. The original mortgage due by Torres was cancelled and erased on the execution of the new one. The crops were shipped to De Ford & Company in 1902 and 1903, and were sufficient to pay the interest. In the crop year 1904, Torres solicited advances from De Ford and Company to enable him to make his crop, and acceding to his request the firm either directly advanced or paid off advances made by others, charging the same to Torres. When the crops came in and were sold, their proceeds were inadequate to pay these advances and the interest. They were imputed primarily to the advances leaving the interest unpaid, this being done with the assent of Torres, who had monthly accounts rendered him and made no objection whatever to the debiting of advances or the imputation of payment. The interest for 1904 remained unpaid and a suit to foreclose the mortgage was commenced by a summary, or executory process in accordance with the local mortgage law. There was filed with this suit a certificate reciting that the mortgaged property stood upon the public records in the name of Torres, this certificate having been issued by the registering office a day or two before the commencement of the suit. On the day the foreclosure suit was filed,

TORRES *v.* LOTHROP, LUCE & COMPANY.

APPEAL FROM AND IN ERROR TO THE SUPREME COURT OF PORTO RICO.

No. 17. Argued October 31, 1913.—Decided December 1, 1913.

The due process clause of the Federal Constitution does not control mere forms of procedure provided only the fundamental requirements of notice and opportunity to defend are afforded. *Louisville & Nashville R. R. Co.* v. *Schmidt*, 177 U. S. 230.

Where the appellate court is without authority to consider errors of the trial court, which were not there assigned, this court cannot reverse the appellate court for error in not deciding matters which it had no authority to pass on.

Although proceeds of a crop received by a mortgagee of the land may by law be imputed to payment of interest on the mortgage and not to other advances, they may, under a special contract with the mortgagor and by his subsequent acquiescence, be applied to payment of advances instead of interest.

In the absence of clear conviction of error, this court follows the conclusions of the court below in applying the local law.

One who has transferred his mortgaged premises by deed recorded prior to the foreclosure suit cannot set the foreclosure aside on the ground

whether before or after does not appear, Torres sold the property to Alvarado for a small sum in cash and a large amount secured by mortgage and this deed of sale was put upon the registry before any cautionary notice of the suit was, or could have been recorded. Conformably to law, the court ordered a demand made upon Torres notifying him of the suit and calling upon him to pay the debt within thirty days, in default of which, the property would be sold. Although he was served with this notice, Torres ostensibly took no heed of the proceedings, but Alvarado as the registered owner of the property filed a petition to enjoin the foreclosure proceedings on grounds which, although they are not fully set out in the record, it is conceded were substantially identical with those here relied upon. No injunction was granted and the suit having been twice called for hearing, was dismissed for want of prosecution. An order for the seizure of the property was in due season awarded by the court, as was also another order stating the amount of the debt and directing the sale of the property. It was seized, advertised and sold by the marshal and bought in by one Rosaly, who assumed the mortgage sued upon in the foreclosure proceedings and paid a small cash price. It then developed that the deed to Alvarado which was on the records was an insurmountable obstacle to the completion of the purchase made by Rosaly under the foreclosure and in those proceedings he began what was tantamount to an hypothecary action against Alvarado as a third possessor to compel him to pay the mortgage debt or cancel the inscription of his deed of purchase. Alvarado appeared in these proceedings, admitted that he could not pay the mortgage debt and could not hold the property unless he did, that he had brought his suit to enjoin and had intentionally abandoned the same and consented to the erasure of the inscription of his deed of sale. This being done, the marshal made a deed to Rosaly in confirmation of the

foreclosure sale, which was duly inscribed. Subsequently, Rosaly having given a mortgage in favor of the firm of De Ford, Luce & Company who were the successors in right of De Ford & Company, by legal proceedings obtained an erasure of the inscription of the Torres mortgage which he, Rosaly, had assumed at the foreclosure sale on the ground that the same had been discharged.

A little more than a year after, that is, on the twentieth of April, 1907, Torres and Alvarado, in a notarial act, rescinded the sale which had apparently taken place between them, it being recited in the act that the rescission was the result of an agreement which had taken place between the parties in 1905 and that it was caused by the refusal of the wife of Alvarado to join in the mortgage which was given by him in the deed of sale.

Eight months afterwards, as we have seen, in January, 1908, Torres commenced this suit upon the general grounds which we have at the outset outlined. The assignments of error which are relied upon to reverse the judgment, affirming the action of the trial court, in dismissing the suit, are nineteen in number. While we think their inherent weakness is apparent from the facts which we have just stated, we briefly notice them.

1st. The summary or executory process provided by the mortgage law, which was followed in foreclosing the Torres mortgage, it is insisted was so deficient in notice or so wanting in opportunity to defend as to cause that law to be repugnant to the due process clause of the Constitution of the United States. Without pausing to apply the elementary doctrine that the due process clause does not control the mere forms of procedure provided only the fundamental requirements of notice and opportunity to defend are afforded (*Louisville & Nashville Railroad Co.* v. *Schmidt*, 177 U. S. 230), and without stopping to indicate how clearly these fundamental rights were provided for as demonstrated by the facts which we have enumerated, we

think it suffices to say that it does not appear that the contention of want of due process was urged either upon the trial court, or was assigned as error in the court below, or was passed upon by that court. And as in its opinion in this case concerning another subject the court below pointed out that it was without authority to consider errors complained of which were not presented to the trial court, it follows that in any view, it could not be held that the court below erred in deciding a matter which it did not decide and which it had no authority to pass upon.

2nd. It is contended that the ninth clause of the act of mortgage of 1901 was mandatory and prohibited the firm of De Ford & Company from advancing to Torres, at his request, money to make his crop for the year 1904, and therefore such advances were not properly chargeable against the proceeds of the crop and hence the interest was paid because the whole proceeds of the crop, if so imputed, disregarding the advances, would have been adequate to have paid the interest. But we think the court below was right in refusing to sustain this fictitious payment of interest or to uphold the construction of the contract upon which it was based. We concur with the court below that the contract did not exclude the right of the firm to advance to Torres at his request, sums to aid him in making a crop and thus to enable him to carry out instead of disregarding the letter and the spirit of the contract. This view, of course, disposes of the contention that error was committed in admitting proof of the agreement to make the advances and of their receipt by Torres and his acquiescence in and approval of the accounts which were rendered him on the subject.

3rd. It is urged, although Torres was fully informed of the institution of the foreclosure proceedings by the demand made upon him under the order of court, conformably to the mortgage law, and had the opportunity to defend afforded by that law, nevertheless the proceedings

were void because no copy of the petition of foreclosure and citation, as provided by the Code of Civil Procedure in ordinary cases, was issued and served. The contention is based upon the proposition that the Code of Procedure in force at the time the suit to foreclose was brought to the extent that it directed service of citation and summons in ordinary cases was cumulative and applicable to proceedings under the mortgage law, because not incompatible with such law. But construing and applying the local law the court below held that this contention was without merit, a conclusion which we follow in the absence of a clear conviction that error was committed, which is far from being the case, and because in any event, for reasons which we shall hereafter state, the contention was additionally without merit.

4th. We group under this paragraph all the other errors relied upon, specifying only those which we consider of importance: *a*, That the wife of Torres as a widow in community was not made a party defendant in the foreclosure suit; *b*, that the notes secured by the mortgage were not annexed to the petition to foreclose or filed therewith; *c*, that the order of the court directing the notice of demand was signed only by two out of the three judges composing the court, and by an attorney at law who was then acting as judge because of the recusation of a member of the court; *d*, because the act of mortgage did not contain a specification of value or appraisement for the purposes of foreclosure; *e*, because of an asserted defect in the advertisement which preceded the sale; *f*, because of the absence from the foreclosure record of the order finding the amount due and directing its payment. The court disposed of all these objections separately upon considerations of local law which we see no reason to reverse, but which we do not refer to in detail, because, in addition it held them all untenable upon a general and we think, conclusive ground to which we refer.

It is not challenged, as pointed out by the court, that under the law of Porto Rico the state of the public record as to title is the dominant factor controlling proceedings for the foreclosure of a mortgage and therefore that the one in whose name a property stands, recorded upon the public records, is the essential party to a proceeding to foreclose. Nothing could better illustrate the correctness of these propositions than do the proceedings in this case, since in consequence of the existence of the registry of the title in Alvarado, resulting from the sale made to him by Torres, the foreclosure proceedings against Torres and the judicial sale thereunder were inefficacious to transmute the title and it became essential for Rosaly, the purchaser at such sale, to commence proceedings to enforce the mortgage as against Alvarado as a third possessor. Applying these principles the court held, in view of the existence of the record title in Alvarado, of his suit to restrain the foreclosure proceeding and its dismissal for want of prosecution, of the steps taken against him as a third possessor and his admissions on the subject and consent to the erasure of the inscription of his title, that the foreclosure proceedings were binding and it was not open to Torres who so far as the record was concerned had parted with his title, to assail them on the grounds which we have stated. The correctness of the premise and of the conclusion itself abstractly considered is not denied, but it is insisted that they are here inapplicable because the sale made by Torres to Alvarado was a mere fiction or simulation and one of the matters complained of which we have not specified is that error was committed in refusing to permit proof of the simulation.

The court below, however, considered and disposed of the alleged distinction in so conclusive and succinct a manner that we adopt and place our own conclusion upon it:

"Alvarado was the record owner and the ostensible

owner. He not only had a duly recorded public document in his favor, but he had begun a suit similar to the present one and this course of action was inconsistent with the possession by anyone else.

"The appellant complains that the court erred in not permitting him to show that the conveyance made from Torres Zayas to Alvarado was fictitious or simulated and that the real party in interest was always Torres Zayas. We cannot see that the court committed an error in refusing to admit such testimony; at most Alvarado would have to be considered as the agent or representative of Torres Zayas and the maxim *qui facit per alium facit per se* may be held to apply. The registry system in Porto Rico exists to apprise purchasers and others who are the true owners of property, and if a man after treating with the apparent owner, may still have his title impugned by a secret agreement existing between such record owner and the alleged true owner there would be no security in the acquisition of property."

Affirmed.